Supreme Court of the United States

OCTOBER TERM, 1970

No. 121

RICHARD MAYBERRY,

Petitioner,

—v.—

PENNSYLVANIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT

INDEX

IN THE QUARTER SESSIONS COURT OF
ALLEGHENY COUNTY, PENNSYLVANIA

DOCKET ENTRIES

Court met Thursday, Nov. 10, 1966 at 9:30 A.M. E.S.T.

PRESENT

Honorable Gwilyn Price Jr.
Honorable Albert A. Fiok
Honorable Frederic G. Weir

SPECIALLY PRESIDING

Honorable Earl S. Keim	10th Judicial District
Honorable James A. Reilly	14th Judicial District
Honorable H. Clifton McWilliams	47th Judicial District

COURT OPENED BY COURT CRIER—ANGELO COSENTINO

COMMONWEALTH

vs

HERBERT FRED LANGNES
RICHARD OLIVER JOSEPH MAYBERRY
DOMINIC CODISPOTI

No. 4672 of 1965 Approved

Charge: Holding Hostages in Penal Institution/Prison Breach

Judge: Albert A. Fiok

A.D.A. Robert Medonis—advisors—T. Livingston for Langnes, T. A. Harper for Codispoti, S. Saraf for Mayberry

Pros. Harry Anderson

And now, Nov. 7, 1966 and Nov. 9, 1966 Defendants present with counsel in open Court when Jury was selected in this case

And now, Nov. 10, 1966 Defendants in open Court with counsel severally plead not guilty. Issue joined by

District Attorney. A jury being called there came: Arcilius D. Lyle Sr., William J. Watt, Dominic Tignanelli, Irene Lucciola, Stella Cieslak, Doris G. Getty, John T. Miller, Joseph Plachecki, Mary E. Werthman, Marlene F. Kraft (Frechs), Steve A. Casper and Ruth Marlowe. Alternate are the following No. 13 Ferdinand Malik and No. 14 Dorothy Haenel.

And now, Nov. 18, 1966 at 1:55 P.M. Alternate Juror No. 14 Dorothy Haenel excused due to illness. Fourteen good and lawful men and women, duly summoned, returned, elected by ballot empanelled and sworn do respectively say,

And now, Dec. 9, 1966 as to each defendant—Guilty See verdict filed as charged on both counts.

And now, Dec. 9, 1966 in open Court, Defendants present with counsel when verdict recorded.

And now Dec. 12, 1966 as to each defendant the following sentence imposed.

Eodie, in open Court defendants appearing with counsel are each sentenced to pay a fine of 6¼¢ to the Commonwealth pay costs of prosecution and undergo an imprisonment of not less than Fifteen (15) years or more than Thirty (30) years and stand committed, and be sent to the Western Correctional Diagnostic and Classification Center of Pennsylvania. This sentence to take effect upon the expiration of any of the sentences that each defendant is now serving. This sentence applies to the 1st Count of the indictment.

Eodie, as to each defendant, as to the 2nd Count of the indictment the following sentence imposed.

Eodie, in open court Defendants appearing with counsel are each sentenced to pay a fine of 6¼¢ to the Commonwealth, pay costs of prosecution and undergo an imprisonment of not less than Five '5' years or more than Ten '10' years and stand committed and be sent to the Western Correctional Diagnostic and Classification Center of Pennsylvania. This sentence to take effect upon the expiration of the original sentence and any other sentence previously imposed which remains to be served at the time the the offense of Prison Breach was committed as to each defendant.

Application to Withdraw Appearance of Counsel—approved Oct. 26, 1965.

Order granting postponement filed Oct. 1965.

Order granting transcription of testimony, etc. filed Oct. 28, 1965.

Writ of Habeas Corpus filed & dismissed—filed Dec. 16, 1965.

Motion to Quash Indictments filed Dec. 16, 1965.

Petition Dismissing Writ of Habeas Corpus filed Dec. 21, 1965.

Letter requesting Speedy hearing on Motion to Quash Indictments dated Jan. 7, 1966 filed.

Commonwealth's answer to defendant's motion to quash indictments filed Jan. 7, 1966.

Brief Sur Application to Quash Indictment filed Jan. 11, 1966.

Deft's Counter—reply to Comm. Answer to quash indictments filed Jan. 17, 1966.

Order of Judge Olbum making Public Defender available to deft's. for consultation, etc. filed Jan. 17, 1966.

Letter dated Jan. 27, 1966 requesting copy of Judge Olbum's order making Public Defender available to deft's.

Opinion of Judge Graff denying petition to quash indictments filed Feb. 1, 1966.

Letter dated Feb. 3, 1966 requesting copy of transcript of hearing on motion to quash filed Feb. 9, 1966.

Order of Judge Graff authorizing authorities of State Correctional Institution at Pgh. to make transcription available to deft's. filed Feb. 9, 1966.

Application for Issuance of Defendant's subpoena filed Mar. 30, 1966.

Application for Bill of Particulars filed July 1966.

Application for Issuance of Deft's subpoena and show of proof filed Sept. 1966.

Petition to Stay all Proceedings pending Appeal to Superior Court filed.

Bill of Particulars and Acceptance of Service filed Sept. 21, 1966.

Deft's Waiver of Right to Counsel filed Sept. 29, 1966.

Order of Judge Pick to subpoena and produce witnesses at trial filed Sept. 29, 1966.

Order of Judge Fiok appointing Thomas A. Livinston, Esq. as counsel filed Sept. 29, 1966.

Order of Judge Fiok setting date of trial filed Sept. 29, 1966.

Petition for Subpoena of Witnesses filed.

Order of Judge Fiok directing Supt. of State Correctional Inst. at Pgh. to issue civilian clothing to deft's for trial filed Oct. 14, 1966.

Order of Judge Fiok re-setting date for trial filed Oct. 25, 1966.

Petition to Amend application of Issuance of Deft's subpoena filed Oct. 28, 1966.

Order of Judge Fiok directing certain witnesses be produced for trial of deft's. filed Nov. 1, 1966.

Petition for change of Venue—Denied by Judge Fiok filed Nov. 1, 1966.

Application to Quash Indictment—Denied by Judge Fiok filed Nov. 4, 1966.

Order of Judge Fiok directing Montgomery and Rockwell be produced as defense witnesses filed Nov. 10, 1966.

Order of Judge Fiok directing Manuel Madronal be produced as defense witness filed Nov. 21, 1966.

Pet. for copies of Notes of Testimony, etc. in Forma Pauperis filed Mar. 22, 1967.

Order of Judge Fiok for contempt of court filed Apr. 4, 1967.

Order of Judge Fiok directing transcripts be made available to deft. filed June 27, 1967.

Certioraries to Superior Court at Nos. 95 and 96 April Term, 1967 filed Jan. 19, 1967.

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Nos. 102 to 113 March Term, 1967

COMMONWEALTH OF PENNSYLVANIA

v.

HERBERT F. LANGNES,
RICHARD OLIVER JOSEPH MAYBERRY,
DOMINICK CODISPOTI

APPEAL OF RICHARD OLIVER JOSEPH MAYBERRY

FOR APPELLANT:

RICHARD O. J. MAYBERRY, I.P.P.

FOR APPELLEE:

ROBERT W. DUGGAN, District Attorney
CHARLES B. WATKINS, Asst. Dist. Atty.

August 11, 1967 Transferred to Philadelphia
October 23, 1967 Continued
March 19, 1968 Non Pros
September 30, 1968 Transferred to Philadelphia
November 12, 1968 Argued 388

DECISION

April 23, 1969 Judgment of sentence affirmed. Jones, J.

Mr. Justice Roberts filed a concurring opinion.
Mr. Justice Eagen concurs in the result.
Mr. Justice Cohen concurs in the result.
Mr. Justice O'Brien filed a concurring and dissenting opinion.

March 20, 1968, Certificate of Non Pros sent to court below.
July 31, 1969 Remitted

DOCKET ENTRIES

January 30, 1967, Petition in Forma Pauperis granted. Appeal from the judgment of sentence of 2 to 4 years of the Court of Oyer & Terminer and General Jail Delivery and Court of Quarter Sessions of the Peace of Allegheny County at No. 4672 September Term, 1965.

February 1, 1967, Appeal and affidavit filed and writ exit, returnable last Monday of September, 1967.

February 16, 1967, Appearance for appellee, filed.

July 21, 1967, Petition to continue, filed.

August 1, 1967, Answer filed.

ORDER

August 7, 1967

Petition granted

Per Curiam.

October 18, 1967, Petition to continue, filed.

ORDER

October 23, 1967

Petition granted

Per Curiam.

January 9, 1968, Appearance for appellee, filed.

February 26, 1968, Petition to continue, filed.

February 28, 1968, Answer filed.

ORDER

March 5, 1968

Petition denied

Per Curiam.

March 11, 1968, Petition for reconsideration of petition to continue, filed.

March 12, 1968, Answer filed.

ORDER

March 14, 1968

Petition denied

Per Curiam.

ORDER

AND NOW, March 19, 1968, appellant having failed to proceed, a judgment of non pros is entered.

By the Court.

July 12, 1968, Petition to remove judgment of non pros, filed.

July 18, 1968, Answer filed.

ORDER

August 5, 1968, Petition granted. Judgment of non pros removed. Daniel F. Daley, Esq., of Luzerne County is appointed to represent petitioner on appeal.

By the Court.

August 7, 1968, Certified copies of Order sent to lower Court and to Daniel Daley, Esq.

ORDER

AND NOW, this 13th day of August, 1968, it is directed that the Order of August 5, 1968, appointing Daniel Daley, Esquire, of Luzerne County, to represent the Petitioner, Richard Oliver Joseph Mayberry, on appeal in the above captioned matter, be and the same is hereby revoked; and

IT IS FURTHER ORDERED that Peter Kanjorski, Esquire, of Luzerne County, be and is hereby appointed to represent the Petitioner, Richard Oliver Joseph Mayberry, on appeal in the above captioned matter.

Per Curiam.

September 16, 1968, Appearance for appellant, filed.

September 27, 1968, Petition to continue, filed.

September 27, 1968, Answer filed.

September 27, 1968, Record filed.

ORDER

September 30, 1968
Petition granted

Per Curiam.

May 1, 1969, Petition for Extension of Time to File Petition for Reargument, filed.

May 8, 1969, Petition for waiver of counsel, filed.

ORDER

May 13, 1969

Petition granted with permission to file petition for reargument on or before May 26, 1969.

Per Curiam.

ORDER

June 3, 1969, Petition granted, but counsel is directed to file a brief amicus curiae.

Per Curiam.

MAYBERRY APPEAL

IN THE SUPREME COURT OF PENNSYLVANIA WESTERN DISTRICT

Nos. 102 to 113 March Term, 1967

COMMONWEALTH OF PENNSYLVANIA

v.

HERBERT F. LANGNES ET AL.

Appeal from Judgments of Sentence of the Court of Oyer and Terminer of Allegheny County, No. 4672, September, 1965

APPEAL OF RICHARD MAYBERRY

Argued November 12, 1968. Before BELL, C. J., JONES, COHEN, EAGEN, O'BRIEN and ROBERTS, JJ.

Appeals, Nos. 102 to 113, inclusive, March T., 1967, from judgments of Court of Oyer and Terminer of Allegheny County, Sept. T., 1965, No. 4672, in case of Commonwealth v. Herbert F. Langnes, Richard Mayberry et al. Judgments affirmed.

Contempt of court.

Defendant adjudged guilty of contempt and judgments of sentence entered, opinion by FIOK, J. Defendant appealed.

OPINION BY MR. JUSTICE JONES, April 23, 1969:

Herbert Langnes, Dominic Codispoti and Richard Mayberry were indicted by the Grand Jury of Allegheny County on two charges: (1) holding hostages in a penal institution and (2) prison breach. All three defendants were tried together and all three defendants were found guilty on both counts.

Richard Mayberry entered a plea of not guilty, waived

his right to representation by counsel and chose to act as his own counsel at trial.[1]

On December 12, 1966, the court sentenced Mayberry to a term of imprisonment of not less than fifteen or more than thirty years on the first count and not less than five or more than ten years on the second count. These sentences were to be served consecutively at the expiration of any sentence Mayberry was already serving.

On the same day the court also sentenced Mayberry on eleven separate acts of criminal contempt which allegedly took place during the trial of the case and imposed a sentence of not less than one or more than two years for each separate act of criminal contempt, said sentences to be served consecutively at the expiration of the sentences imposed for the two crimes of which he had been convicted. From these judgments on the contempt charges Mayberry has filed the instant appeals.[2]

Mayberry in his brief presents three contentions: (1) that he was denied the right to trial by jury on the contempt charges in violation of the Sixth and Fourteenth Amendments to the United States Constitution; (2) that he was denied due process of law by being convicted and sentenced for criminal contempt without procedural safeguards; (3) that he has been subjected to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution in being sentenced to a minimum of eleven and a maximum of twenty-two years on the contempt charges. Mayberry's appointed counsel in his brief raises the following issues: (1) that the court erred in failing to provide Mayberry with substantive constitutional safeguards by not apprising him of the nature and elements of the crime

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[1] The court appointed a representative of the Public Defender's office to act as Mayberry's consultant during trial.

[2] On March 19, 1968, a judgment of non pros. was entered because of Mayberry's failure to file a brief, but on August 5, 1968, this Court removed the judgment of non pros. reinstated Mayberry's appeal and appointed counsel to represent him in these appeals. Both Mayberry and his counsel have each filed separate briefs on Mayberry's behalf.

of criminal contempt, by not giving timely notice of the commission of criminal contempt, by not informing him of his right to counsel and in failing to provide him with counsel at the time of sentence; (2) that the statute providing for criminal contempt is unconstitutional as applied to the instant factual situation.

The contempt charges grew out of Mayberry's conduct during the course of the trial where he acted as his own counsel. An examination of the record reveals a course of conduct on Mayberry's part almost beyond belief and of an obviously and patently planned and determined attempt on Mayberry's part to interfere with the administration of justice and to make a farce and mockery of his trial. Mayberry accused the trial judge of denying him a fair trial, called him a "hatchet man for the State" and a "dirty S. O. B.," stated he would not "be railroaded into any life sentence by any dirty tyrannical old dog like [the judge]," told the trial court "to keep [his] mouth shut," referred to the court as a "bum" and a "stumbling dog," accused the court of working for the prison authorities and of conducting a Spanish Inquisition. He further told the judge that he was in need of psychiatric treatment and was "some kind of nut." These few examples are indicative of Mayberry's outrageous conduct during the course of the trial. Moreover, in open court, Mayberry stated his intention of disrupting the court's charge to the jury and carried out his intention to such an extent that the court was finally forced to have him gagged, placed in a strait jacket and removed to an adjoining courtroom to which the charge to the jury was broadcast through a public address system. The record further demonstrates beyond any question that Mayberry's behavior was calculated and planned with the aim of disrupting the orderly procedure of the trial and the administration of justice.

Right to Trial by Jury

In *Duncan* v. *Louisiana*, 391 U.S. 145, 20 L. Ed. 2d 491 (1968), the United States Supreme Court held that the Constitution guaranteed the right to jury trial in

serious criminal cases in state courts. In *Bloom* v. *Illinois*, 391 U.S. 194, 20 L. Ed. 2d 522 (1968), the Court was called upon to decide whether the Constitution guaranteed the right to a jury trial for a criminal contempt punished by a two-year prison sentence. Holding that "petty crimes need not be tried to a jury" and recognizing that the court had deemed it unnecessary under *Duncan* to fix "the exact location of the line between petty offenses and serious crimes," the court held that a criminal contempt punishable by a two-year prison sentence constitutes a serious crime which entitles a defendant to the right to trial by jury and that it is constitutional error to deny the defendant such right. If *Duncan* and *Bloom* are presently applicable, Mayberry would be entitled to a jury trial on the contempt charges.

However, the United States Supreme Court, in *DeStefano* v. *Woods*, 392 U.S. 631, 20 L. Ed. 2d 1308 (1968), held that *Duncan* and *Bloom* "should receive only prospective application." Since *Duncan* and *Bloom* were decided in 1968 and since Mayberry's trial took place in December, 1966, the rulings in *Duncan* and *Bloom* do not apply to Mayberry, and Mayberry is not entitled to a trial by jury on the contempt charges.

Denial of Due Process

The contempt charges upon which Mayberry was sentenced constituted *direct* criminal contempts which took place in open court in the presence of the court and the jury. Punishment for direct criminal contempt may be inflicted summarily. See: *Philadelphia Marine Trade Association* v. *International Longshoremen's Association*, 392 Pa. 500, 509, 140 A. 2d 814 (1958).[3]

The Act of June 16, 1836, P. L. 784, § 23, 17 P.S. § 2041, provides, inter alia, as follows: "The power of the several courts of this commonwealth to issue attachments and to inflict summary punishments for contempts

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[3] The Act of June 23, 1931, P. L. 925, § 1, 17 P.S. § 2047, provides for the due process requirements to which a defendant is entitled when charged with *indirect* criminal contempt.

of court shall be restricted to the following cases, to wit: . . .

"III. To the misbehavior of any person in the presence of the court, thereby obstructing the administration of justice." In a direct criminal contempt, the court has the inherent power to protect its judicial dignity and conscience and to protect itself from insult and abuse. See: *Aungst Contempt Case*, 411 Pa. 595, 192 A. 2d 723 (1963). Section 24 of the Act of 1836, supra, provides: "The punishment of imprisonment for contempt as aforesaid shall extend only to such contempts as shall be committed in open court, and all other contempts shall be punished by fine only." (17 P.S. § 2042)

In *Weiss* v. *Jacobs*, 405 Pa. 390, 394, 395, 175 A. 2d 849 (1961), this Court said: "In In Re Oliver, 333 U.S. 257, at 275-276, the United States Supreme Court stated: 'due process of law, . . . requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf either by way of defense or explanation. *The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the Judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the Court. . . . and where immediate punishment is essential to prevent "demoralization of the Court's authority" before the public.* If some essential elements of the offense are not personally observed by the Judge, . . . due process requires, . . . that the accused be accorded notice and a fair hearing. . . .'" (Emphasis added)

The instant contempt charges arose out of the misconduct and misbehavior of Mayberry before the court and all the actions and utterances upon which these contempt charges were based took place in front of the trial judge. Under such circumstances, the court had plenary power to punish summarily for such contumacious conduct. To hold otherwise would be to offend the inherent powers of a court, particularly when the misconduct and misbe-

havior were as outrageous as that of Mayberry in the instant case.

We find no evidence under the circumstances of a violation of the constitutional due process requirements so far as Mayberry is concerned.

Did the Sentences Constitute Cruel and Unusual Punishment?

The court below imposed not one but eleven sentences, each based on a separate contemptuous act of Mayberry. Each sentence was for one to two years.

The instant record is replete with instance after instance of contumacious conduct on Mayberry's part. Moreover, it is evident beyond question that such conduct was not only in defiance of the court and its dignity but was planned with a view to disrupting the orderly process of the trial and preventing and obstructing the proper administration of justice.

Under the instant circumstances, we conclude that the imposition of eleven one-to-two year sentences is not cruel and unusual punishment.

We now consider the several contentions made by Mayberry's court-appointed appellate counsel in his separate brief on behalf of Mayberry.

Whether the Court Erred in Failing To Advise Mayberry of the Nature and Elements of Criminal Contempt and That His Actions Amounted to Criminal Contempt

Mayberry's counsel urges that it was the duty of the trial judge to warn Mayberry during the trial if and whenever his conduct became contemptuous, relying on *Glasser* v. *United States*, 315 U.S. 60, 86 L. Ed. 680 (1942), *Ogren* v. *Rockford Star Printing Co.*, 288 Ill. 405, 123 N.E. 587 (1919), and *Sacher* v. *United States*, 343 U.S. 1, 96 L. Ed. 717 (1952). We find nothing in these authorities which mandated that the trial judge in the instant case should have on each and every occasion warned Mayberry of his contemptuous conduct. The language and actions of Mayberry, even though he is a layman, were of such a nature that he had every reason to

know that his conduct was in contempt of court; moreover, it is evident from this record that Mayberry's conduct was part of a scheme and plan to disrupt and render chaotic the conduct of his trial. We see no reason, under the circumstances, why Mayberry on each and every occasion should have been warned of that of which he must have been fully aware. He knew that his conduct was outrageous and he deliberately planned such a course of conduct.

We find no merit in this contention.

Is the Act of 1836, Supra, Unconstitutional as Instantly Applied Because It Fails To Establish a Standard of Permissible Behavior and Because Its Terms Are Unclear and Indefinite?

We have carefully considered this contention of Mayberry's counsel and find it absolutely without merit.

The instant case presents an example of a person charged with a criminal offense who deliberately, consciously and intentionally enters upon his trial proposing to so obstruct, by his language and his actions, the orderly trial process in order to thwart the administration of justice. Such conduct cannot and should not be tolerated. To hold otherwise is to make a mockery of criminal trials and to render our courts subject to infamy and abuse.

While at first blush the totality of the sentences imposed might seem harsh, yet in view of Mayberry's conduct the severity of the sentences can be fully and completely justified. Mayberry was found guilty not only of criminal offenses but of having openly defied not only the court but the orderly process of law. As Mr. Justice JACKSON said in *Sacher* v. *United States*, supra (343 U.S. at 5): "The nature of the deportment was not such as merely to offend personal sensitivities of the judge, but it prejudiced the expeditious, orderly and dispassionate conduct of the trial."

Judgments of sentence affirmed.

Mr. Justice COHEN and Mr. Justice EAGEN concur in the result.

CONCURRING OPINION BY MR. JUSTICE ROBERTS:

As to appellant's claim that he was denied the right to a jury trial, I concur in the result reached by the majority solely on the ground that *Bloom* v. *Illinois*, 391 U.S. 194, 88 S. Ct. 1477 (1968), is not retroactive in application. See *DeStefano* v. *Woods*, 392 U.S. 631, 88 S. Ct. 2093 (1968).

CONCURRING AND DISSENTING OPINION BY MR. JUSTICE O'BRIEN:

I agree with the majority that Mayberry was not entitled to a jury trial. Even if *Bloom* v. *Illinois*, 391 U.S. 194, 88 S. Ct. 1477 (1968), applies to direct criminal contempts as well as indirect criminal contempts, which question I find it unnecessary to consider, *Bloom* has been held not to be retroactive. *DeStefano* v. *Woods*, 392 U.S. 631, 88 S. Ct. 2093 (1968). I thus concur in the affirmance of the contempt conviction.

However, I must dissent from that portion of the majority opinion which upholds the sentence imposed on Mayberry. Although appellate courts are naturally reluctant to interfere with the sentencing procedure, a matter within the discretion of the trial court, this Court has a duty to consider whether that discretion has been abused. *Commonwealth* v. *Edwards*, 380 Pa. 52, 110 A. 2d 216 (1955). The duty is particularly crucial in direct criminal contempt cases where no statutory limit is placed upon the trial judge's discretion. *Brown* v. *United States*, 359 U.S. 41, 79 S. Ct. 539 (1959); *Green* v. *United States*, 356 U.S. 165, 78 S. Ct. 632 (1958).

I wish to emphasize that I hold no brief whatsoever for appellant's utterly deplorable conduct and I sympathize with the trial judge for the indignities both he and the judicial system were made to suffer as a result of appellant's conduct. Nonetheless, I believe that the sentence imposed here exceeded all bounds of reasonableness. While the court below treated each of appellant's comments as a separate contempt and imposed eleven separate one to two year sentences to run consecutively, I think that a more realistic view of what occurred was

that there was only one contempt—appellant's trial conduct as a whole—and that for this he was given a sentence of eleven to twenty-two years. Cf. *Yates* v. *United States*, 355 U.S. 66, 78 S. Ct. 128 (1957).

My research discloses no case in which the punishment meted out even approaches that here. The majority quotes, as support for the sentence here, from *Sacher* v. *United States*, 343 U.S. 1, 5, 72 S. Ct. 451 (1952): "The nature of the deportment was not such as merely to offend personal sensitivities of the judge, but it prejudiced the expeditious, orderly and dispassionate conduct of the trial." Yet those held in contempt in *Sacher* were sentenced only to terms of up to six month's imprisonment for a course of conduct that was as flagrant a defiance of the orderly processes of court as that involved here. Sacher and his fellows, *inter alia*: "Insinuated that there was connivance between the Court and the United States Attorney . . . Repeatedly made charges against the Court of bias, prejudice, corruption, and partiality . . . Made a succession of disrespectful, insolent, and sarcastic comments and remarks to the Court . . . [etc.]." *United States* v. *Sacher*, 182 F. 2d 416, 431 (2d Cir. 1950).

Although there is no doubt that the dignity of our courts must be upheld, by the contempt process, if necessary, in a Commonwealth where assault and battery is punishable by a maximum of two years' imprisonment, larceny by a maximum of five, voluntary mansalughter by a maximum of twelve, rape by a maximum of fifteen, and second-degree *murder* by a maximum of twenty, a maximum sentence of twenty-two years for interference with the courtroom process and insults to the judge is cruel and unusual. I note that in title Three of The Penal Code of 1939, entitled "Offenses against Public Justice and Administration", of the thirty-one crimes enumerated, only two—perjury (seven years) and prison breach (ten years) carry a maximum sentence of more than five years. No crime in the category carries with it a penalty approaching the twenty-two years given appellant, and I must dissent from the imposition of that sentence.

VOL. I

IN THE COURT OF OYER & TERMINER
AND GENERAL JAIL DELIVERY OF
ALLEGHENY COUNTY, PENNSYLVANIA

4672 of 1965

COMMONWEALTH OF PENNSYLVANIA

vs.

HERBERT F. LANGNES
RICHARD OLIVER JOSEPH MAYBERRY
DOMINICK CODISPOTI

Pittsburgh, Pennsylvania
November 7, 1966

BEFORE: HON. ALBERT A. FIOK, J., AND A JURY

TRANSCRIPT OF OFFICIAL NOTES OF TESTIMONY

COUNSEL PRESENT

On behalf of the Commonwealth:

ROBERT X. MEDONIS, ESQ., Assistant District Attorney

On behalf of Defendant Langnes:

THOMAS A. LIVINGSTON, ESQ.

On behalf of Defendant Mayberry:

SAMUEL H. SARRAR, ESQ., Public Defender

On behalf of Defendant Codispoti:

THOMAS A. HARPER, ESQ., Public Defender

JOHN H. GOODWORTH
Official Court Reporter
312 Courthouse
Pittsburgh, Pennsylvania

* * * *

[fol. 5] MR. LIVINGSTON: Prior to the voir dire I asked the Court before, and ask again, to have an opportunity out of the hearing of the jury, preferably at side bar with myself and the client I have been provided to advise.

MR. HARPER: I would also make the same request.

THE COURT: We will not have Mr. Langnes at side bar. We will have counsel at side bar.

MR. LIVINGSTON: I want to interrogate Mr. Langnes for the purpose of the record out of the hearing of the jury.

[fol. 6] THE COURT: Well, I would suggest that you interrogate him in private. Then if you want to have a side bar you may come up at side bar.

MR. LIVINGSTON: I want to put questions and answers on this record to make clear to protect myself in the event of an appeal. I think it is proper, and I have done it before in matters of this type. I think because of the uniqueness of this particular situation that I might approach the bench and indicate to the Court precisely what I hope to do out of the hearing of the jury.

THE COURT: You may approach the bench.

(At side bar conference.)

MR. LIVINGSTON: I want to put on the record, as I have put before Judge Graff, with the passage of time, I want to bring this thing up to date. I want to bring before this Court and on this record and to advise Mr. [fol. 7] Langnes of the offenses that he has been charged with, advise him of the seriousness of these offenses, and the punishment to which he may be subjected as a result of a conviction, and with the full knowledge of these crimes and potential punishments, I want him to state on the record it is his desire not to have me represent him even though appointed as an adviser by the Court. I don't want to be criticized in an Appellate Court. Before Judge Graff I put on the record what my position was and only care to do this because of the passage of time. I don't want something to happen on appeal where he changes his mind after several weeks interval, and I

want it on the record to show it is my intention as adviser in this court to not interfere with the right that he has elected to proceed by representing himself, and of course, I will make myself available at all times during this trial, that I will make myself available after court hours if this be his wish, purely as an adviser, but I am [fol. 8] not going to take an active part in this case in the present state of the record without his requesting this.

I think this would constitute an infringement upon his right to represent himself. I don't want to interfere with it.

THE COURT: That may be so. However, you have been appointed by this Court to represent Mr. Langnes. While you may with some propriety make that statement as a matter of record, I would request that insofar as any matters of a leading nature are concerned that perhaps you should advise Mr. Langnes about the matters, and during the course of the trial as well as the voir dire examination, possibly you may want to put certain other matters on the record to protect the record and to protect not only yourself but the right of Mr. Langnes in this case.

I think that we will have a much better record, and [fol. 9] that will be done so as to eliminate any possible questions later on as to what your role in this case has been.

MR. LIVINGSTON: I may say this for the record, Your Honor, that I recognize as a lawyer that this individual has a lawful and solid right to represent himself. As a lawyer I could not in good conscience either by direction of the Court or otherwise interfere with this particular right. I have made my position clear prior to this trial, and I make my position clear again that I will not in this case interfere in any way with the rights of this particular defendant to handle and conduct his own trial. I think it is foolish that he tries to do it.

THE COURT: Yes. I appreciate that, but I don't want the impression to be perpetuated here that you are going to be sitting here going through motions. I recognize the fact that no matter what any of counsel

do in this matter the defendants will insist upon [fol. 10] certain questions, upon certain procedures that they wish to follow, and it is only to the extent that I don't want the record to show that you are merely sitting by inactive, and that from time to time there may be necessity of stating for the record that you have advised the defendants one way or another. Not that they will follow your advice, but as a matter of protection, because I don't want this record to show or even have someone interpret this record as showing that we have only gone through the formal motion of appointing counsel. There will be times that I think it will be the duty of counsel to speak, and if the defendants in their right to represent themselves do not wish to follow the advice of counsel, that is their prerogative. But from time to time I think it will be incumbent upon counsel to state that so that there can be no misunderstanding here, that it is the effective assistance of counsel rather than just motions.

[fol. 11] MR. LIVINGSTON: From our prior encounter it is quite clear that I won't shirk my responsibility, and I will advise where asked by the client. I will not hesitate to put my opinion of the legal consequences of any particular act on record. This I will do. But I simply want to state my position that I will not in any way interfere with the rights of this defendant Langnes to represent himself. I will not hesitate when called upon to speak in his behalf in open court.

I have made myself available throughout the trial. I have advised the institution and put a great deal of time in the case up to now and have not just been in a passive position. I have been very active, but as the Court may well know much of my advice has gone unheeded.

I don't want to be in the position of taking a part and being criticized in the Appellate Court as to what might develop from an inference it is my advice when in [fol. 12] fact it isn't.

THE COURT: I understand your position. Does any other counsel wish to place anything on the record at this stage?

Then we will grant you the right to call each individual client up separately and apart from the others so that you may in his presence place your views on the record.

MR. SARRAF: I think the record should show for the public defender's office an adviser has been assigned originally, Your Honor, and Mr. Ross has indicated that he may ask Your Honor if we may be rotated or not. That is another problem, Your Honor, but you may want to take that up with Mr. Ross.

THE COURT: I can answer that quickly. You will not be rotated.

MR. SARRAF: All right. But I suggest that from our inception Mr. Livingston has quoted our status in this case, I believe. Am I right?

[fol. 13] MR. LIVINGSTON: Further, Your Honor, I would like to get something else on the record in behalf of the defendant Dominic Codispoti. I again conferred with Mr. Codispoti in regards to representation in this case, and he has again confirmed that he wishes to represent himself. He has stated no objection to me sitting there as an adviser to him, but he did want me to call to the Court's attention that a petition has been filed on behalf of all three defendants whereby they are requesting this Honorable Judge to disqualify himself from hearing this case.

Now, certainly since they are trying the case themselves all I can do is advise the Court that they have filed a petition, and I think that it is within their rights that the Court rule on their petitions before we engage this jury.

THE COURT: This is a petition that was just filed or just presented because we do have a petition to that [fol. 14] effect, and the Court has taken action on that.

MR. LIVINGSTON: The petition was filed some time ago.

THE COURT: We will make it a matter of record in these proceedings, although there is an order filed in connection therewith. The request or petition of the respective defendants is denied.

(End side bar conference.)

(At side bar conference.)

MR. LIVINGSTON: Mr. Langnes, when this case was called for trial before I indicated to you what the nature of the charges were. I indicated to you on prior occasions that you have been charged with prison breach and holding hostage in a penal institution. Did you hear the Court this morning describe what those offenses were?

MR. LANGNES: Yes, I did.

MR. LIVINGSTON: Are you familiar with the [fol. 15] offenses?

MR. LANGNES: I am fully familiar.

MR. LIVINGSTON: Are you familiar with the fact that for a prison breach you could be sentenced to a term not exceeding ten years?

MR. LANGNES: Yes.

MR. LIVINGSTON: And for holding a hostage you could be sentenced to undergo imprisonment by separate and solitary confinement at labor for the term of your natural life, or to pay a fine not exceeding $10,000 and undergo imprisonment by separate and solitary confinement at labor for any term of years?

MR. LANGNES: Yes, I understand.

MR. LIVINGSTON: With your familiarity of the offenses that have been charged against you and the seriousness of the consequences of these offenses, are you also aware that you are entitled to have counsel appointed to represent you?

[fol. 16] MR. LANGNES: Yes, I am.

MR. LIVINGSTON: Are you aware of the fact that I have been appointed as counsel to advise you because you have indicated your desire to represent yourself?

MR. LANGNES: Yes.

MR. LIVINGSTON: With the full knowledge of the facts as I have recited them to you, is it your desire now to have me represent you or to represent yourself?

MR. LANGNES: I still maintain my position in representing myself but you as an adviser.

MR. LIVINGSTON: I will make myself available to you at your request during the court of the trial, but you desire to represent yourself, is that right?

MR. LANGNES: Yes.

THE COURT: You understand that you will be treated and accorded every privilege you are entitled to under the law, but you will not be accorded any privilege that you are not entitled to under the law, and therefore [fol. 17] on any questions of rulings on either law or evidence you will be bound notwithstanding the fact that you do represent yourself. Do you understand?

MR. LANGNES: Yes, sir, I understand that, Your Honor. I mean, all I ask is that I be granted the rights I am entitled to. I didn't want to ask for rights that I had no right to, but I think—

THE COURT: That goes without saying, Mr. Langnes.

MR. LANGNES: But I think the fact that I am representing myself, and I don't think I should be taken advantage of neither, insofar as if there is a technicality in the law that I may overlook. I would appreciate the fact that if either Your Honor or Mr. Livingston would bring me up to this, it is only fair to protect the record.

THE COURT: The Court has to make rulings in accordance with the law. If you feel you are aggrieved [fol. 18] by that under our procedure you may have an exception to that. The Court does not intend to make an explanation of its rulings each time a ruling is made, and this is not intended to go into the whys and wherefores of the rulings, but simply a ruling is made, and if you feel aggrieved by it you may state that for the record, and for your information a special exception is not required. You automatically have an exception.

MR. LANGNES: Yes, sir.

MR. LIVINGSTON: I might say, Your Honor, that I have directed in conversation with all three of the defendants in this case that once the ruling is made by the Court in the matter there is no need for any further argument. The remedy is by appeal.

MR. LANGNES: Yes, I understand that an exception is automatic. But could we just, in other words, at side bar could we discuss—

THE COURT: This will be the last side bar you will [fol. 19] have. Any side bars that you have in the future will be conducted by your counsel.

MR. LANGNES: Without myself being present?
THE COURT: Correct.
MR. LANGES: Even though I am representing myself?
THE COURT: A side bar is only for counsel.
MR. LANGNES: Then I can get the transcript of what was said for appeals?
THE COURT: Eventually you will have and are entitled to a full transcript.
MR. LANGNES: I ask this in order to protect myself that if I am not present I will not know what was said.
THE COURT: You can convey that information to your counsel who will come to side bar. We are not going to have that. We are according you this opportunity of appearing at side bar as a preliminary matter. We do not intend to conduct this case by having you come up at [fol. 20] side bar. Side bar, as I have indicated, is limited to members of the bar. You will not come to side bar as defendants.
MR. LANGNES: But being as this is the only side bar I will be allowed to, can I put on the record right now so that I know it is put in, this matter about our witnesses—will we be allowed to present a show of proof for these witnesses?
THE COURT: I have already requested that, and it is a matter of record that the witnesses that had been requested will be called on behalf of not only you, but the other defendants as well, and you have stated that in a petition as I requested you to do so the reasons for calling certain witnesses. The Court has ruled on the propriety of calling certain witnesses, and those witnesses based upon setting forth the cause of the reason for calling certain witnesses has been made a part of the record by the Court. Those that were deemed essential to the defense, of course, have been subpoenaed and will be called.
[fol. 21] MR. LANGNES: But Your Honor, excuse me. Two main factors are involved here. I believe when we filed that motion, or that show of proof to you, inasmuch as this show of proof would be censored through prison authorities, we couldn't very well give you the

full details in it. I mean, in my particular case in one of my pleas of not guilty by reason of temporary insanity, and another one is not guilty by reason of entrapment, I don't think you were aware of this, Your Honor, and the witnesses that were already allowed by Your Honor are not as important as the ones that have been denied.

There are the ones that have not been allowed to testify in my behalf and in behalf of my co-defendants who are main witnesses. They are the most essential.

THE COURT: Well, you better set them forth and set them forth quickly, because the only thing I can proceed upon is the petition you provided in detail why [fol. 22] those witnesses desired are to be called. I don't want to go into that matter at this time because we are not at that stage of the proceedings, but if you want to present any additional reasons you better present them quickly.

MR. LIVINGSTON: Your Honor has received a copy of show of proof which these people were told by Judge Graff to prepare and have the Court decide on these.

THE COURT: I have not seen that.

MR. LIVINGSTON: Give that to the Court for the Court's perusal. Judge Graff had taken this up with the particular individuals and indicated that they should be specific.

MR. LANGNES: If Your Honor pleases, those are—

THE COURT: That is exactly the same thing that I initially requested from those same defendants when they were first before me.

MR. LIVINGSTON: They indicated to Judge Graff [fol. 23] that there were certain things they couldn't put out through the prison channels, and they could personally do this.

MR. LANGNES: The one, Your Honor—

THE COURT: All right. I will consider that. Let's go on with the voir dire.

MR. SARRAF: We have another matter to take up.

MR. HARPER: I want to get on the record at this time that I have conferred with the defendants again, particularly Mr. Codispoti and Mr. Mayberry, and they

have given to me a copy of a petition for writ of injunction against Your Honor which they had filed in Federal Court on October 31 of this year, and an order signed by Judge Willson.

THE COURT: You better refer to a miscellaneous number of that so we have a record of it.

MR. HARPER: The miscellaneous number is 4144, and all three of the named defendants versus the Honor-
[fol. 24] able Albert A. Fiok, Judge of the Court of Common Pleas of Allegheny County, Pennsylvania, was designated as a defendant. This was a petition for writ of injunction preventing Judge Fiok from presiding over this trial.

Of course, Your Honor, I did not know anything about this, but they have advised me that the order was denied which the Honorable Joseph P. Willson, District Judge, has, and they have appealed their ruling to the Third Circuit. So that the Court will know in the matter of the petition which I mentioned previously that they have an action pending in another court in regard to that matter.

THE COURT: I assure you that will not stop these proceedings, and we will go on.

MR. SARRAF: In connection with that statement made by Mr. Harper, the defendant Mayberry would like to talk to the Court. He doesn't want an intermediary to make the statement. He is going to make the statement
[fol. 25] between himself and the Court at side bar.

THE COURT: What is the nature of the inquiry?

MR. SARRAF: I don't know.

THE COURT: Find out before the inquiry is made.

MR. SARRAF: He wants to make it in person because he says he is entitled to make it because he is going to conduct this trial himself. He thinks it should be done before the voir dire.

THE COURT: I don't know whether this is a matter of voir dire or not. Not knowing that we will permit him to come up and make whatever statement he desires.

(Thereupon Mr. Mayberry approach side bar.)

MR. MAYBERRY: I have a few matters I would like to get on the record, Your Honor, before we proceed picking the jury.

THE COURT: Is that in connection with the picking of a jury?

[fol. 26] MR. MAYBERRY: It is concerning our witnesses and how this trial is going to proceed in being as the defendants are representing themselves.

THE COURT: That is by your own choice.

MR. MAYBERRY: Yes, sir.

THE COURT: Yes.

MR. MAYBERRY: And I understand from speaking to Mr. Langnes that we are not going to be permitted to be present at any side bar that may occur during the trial.

THE COURT: No, you will convey that to your counsel and counsel will make the side bar to the Court.

MR. MAYBERRY: Your Honor, I would object to this on the ground that I am representing myself.

THE COURT: All right. You may have an exception on the record.

MR. MAYBERRY: Your Honor, will I be able to [fol. 27] address the Court out of the hearing of the jury if a matter comes up?

THE COURT: You may through counsel.

MR. MAYBERRY: I have no counsel.

THE COURT: Counsel has been assigned.

MR. MAYBERRY: Purely as an adviser.

THE COURT: If you don't wish to avail yourself of the right, that is up to you. Side bars are intended for counsel of record, not for defendants, and therefore we are going to give you the opportunity at this time. We are not precluding a side bar through your counsel, but we do not propose to have defendants come up to side bar.

You will have to utilize, if you so desire, the services of counsel. Counsel will then make your desires known and protect the record for you.

MR. MAYBERRY: I feel we are entitled to hear the proceedings here at side bar inasmuch as we are defending ourselves and have waived our right to counsel. We [fol. 28] have waived right to counsel, not the right to represent ourselves.

THE COURT: That doesn't give you the right to

participate in side bar discussions which are matters of discussions between counsel of record and the Court.

MR. LIVINGSTON: On behalf of the defendant Mr. Langnes I now object in view of my capacity as adviser. I have no objection to being at side bar which is purely within the discretion of the Court, but I think when he is representing himself he is entitled to be present at every stage of the proceedings, which includes a side bar if there be one.

THE COURT: I have no objection to the defendants making a statement right in open court. I will not permit side bars between the Court and the defendants. You may have an exception.

MR. LIVINGSTON: I have no objection, Your Honor. [fol. 29] MR. MAYBERRY: Will we be permitted to address the Court directly during this trial?

THE COURT: On any matters relevant to the proceedings, you may. We will not go into long discussions or the whys or wherefores on the rulings of evidence. We will make our rulings. You will have an automatic exception which will protect the record.

MR. MAYBERRY: Will we be given a chance to state a reason for the objection?

THE COURT: Not the reason, just the objection, or if there is any special reason you want to state on the record, we will permit you to make that; but no long discussions.

MR. MAYBERRY: Will we be permitted to address the jury when we open for the defense?

THE COURT: We will afford that by first giving that opportunity to counsel. If, of course, you do not wish [fol. 30] counsel to do that for you, we will permit you to make that opening, and the same thing will prevail, and the same rights will be accorded to you insofar as the closings are concerned, but first preferably through counsel. Whether you wish to take advantage of that or not, it is entirely up to you.

MR. MAYBERRY: We will be given an opportunity then if we wish to speak to the jury in opening and summation? We will be given that opportunity?

THE COURT: Yes. You will be limited in time like

every other person would be whether it is counsel or otherwise, but insofar as either your opening or closing statements are concerned, if you do not wish counsel to make that for you we will permit you to do that.

MR. MAYBERRY: As for our witnesses, Your Honor, we submitted a list of a total of 40 witnesses. That is 40 witnesses—

THE COURT: Yes. The Court has already [fol. 31] ruled on that, and I understand that you have presented a separate petition, a copy of which I have, and sometime today I will carefully consider that, and if additional reasons are presented which requires or necessitates the subpoenaing or the production of any other witnesses that will be accorded to you.

If on the other hand the Court feels that no valid reasons subsist for the production of these witnesses our previous ruling will stand.

MR. MAYBERRY: Well, Your Honor, will I be given an opportunity to read into the record the reasons why we want these witnesses and what—

THE COURT: No, you will not, because that is already a matter of record.

MR. MAYBERRY: It is not a matter of record, our full show of proof. We filed—

THE COURT: Then you better file an original so we will file that as a matter of record.

MR. LIVINGSTON: Where is your original, Mr. [fol. 32] Mayberry?

MR. MAYBERRY: I have a copy in the papers. We sent the original, but that is not a complete show of proof.

THE COURT: The judge undoubtedly filed it. I will check. If it is not filed we will file it as a matter of record.

MR. MAYBERRY: That was not a full show of proof, the original one, because we had to send it through guards who were prosecuting witnesses against us, and—

MR. LIVINGSTON: Mr. Mayberry, I have just received from Mr. Langnes on Saturday under the caption show of proof which seems to be more elaborate. Is that a full show?

MR. MAYBERRY: That is a full show.

MR. LIVINGSTON: We will make that a part of the record.

THE COURT: I am suggesting that you make that a part, and not spread it upon the instant record.

[fol. 33] MR. MAYBERRY: This is a full show of proof.

MR. LIVINGSTON: That can be made a part of it.

THE COURT: It will be filed as a matter of record.

MR. MAYBERRY: Will we be given an opportunity to read into the record what we intend to prove by those witnesses?

THE COURT: No.

MR. MAYBERRY: Well, I would like to object to that not being given an opportunity because—

THE COURT: You may have your objections. It is filed of record. This will be filed of record. It is already part of the record.

MR. MAYBERRY: Also, Your Honor, the whole thing in this case remaining—it seems like the Court has the intentions of railroading us and not giving us—

THE COURT: I will not countenance any remarks like that. The side bar is over.

[fol. 34] MR. MAYBERRY: May I say something?

THE COURT: No.

MR. MAYBERRY: Well, we have a petition to disqualify you as the trial judge.

THE COURT: That has been filed for the record in Federal Court, and there is nothing here, and we will take it that you are making an oral motion to disqualify me as a judge, and that is denied.

MR. MAYBERRY: We have filed written motions with Judge Ellenbogen, President Judge.

THE COURT: That is a matter of record, too, and that has been ruled upon, and that motion was denied. So for the purposes of this record let me state again that your motion to disqualify the trial judge is denied.

MR. MAYBERRY: Are you aware that we have an action in the United States Circuit Court of Appeals under the Civil Rights Act for restraining order?

[fol. 35] THE COURT: You may proceed with that as you see fit. It is not going to stop the proceedings here. These proceedings will go on.

MR. MAYBERRY: Even though you are aware that we have an action against you in the Federal Courts?

THE COURT: The Court is not aware of it, but since you told me it is a matter of record.

MR. HARPER: I think it is a matter of record, Your Honor, insofar as what I recited.

THE COURT: You have conveyed it as a matter of record.

MR. HARPER: Correct.

MR. MAYBERRY: Also, we would like to know the number of challenges we will be given.

THE COURT: Under the law you will be given eight peremptory challenges collectively.

MR. MAYBERRY: Even though there is a conflict [fol. 36] among the three defendants?

THE COURT: Under the law you will have eight peremptory challenges collectively.

MR. MAYBERRY: Under the law we are entitled to a severence like I asked for with the United States Supreme Court.

THE COURT: You have a right to request it. You don't have a right to a severance.

MR. MAYBERRY: I have decisions that say otherwise.

THE COURT: Your rights will be protected on that.

MR. MAYBERRY: Will we be given separate trials?

THE COURT: No.

MR. MAYBERRY: Even though there is a conflict of interests?

THE COURT: I have ruled on the request. There will be no severance.

MR. MAYBERRY: And we are going to be forced [fol. 37] to accept eight challenges collectively even though there is a conflict?

THE COURT: You are not forced. That is what the statute provides, and you will abide by the statutes like any other person.

MR. MAYBERRY: Yes, sir, Your Honor, but I also have cases that say where there was a conflict of interests we are entitled to eight apiece.

THE COURT: You will be entitled to eight peremptory challenges collectively.

MR. MAYBERRY: I would like to object for the record to being forced to accept eight when my co-defendants—

THE COURT: You have that as a matter of record now.

MR. MAYBERRY: —when there are conflicts between us. Also, I would like to ask will we be given an opportunity to enter our pleas to this indictment which we haven't given. Our formal pleas haven't been given. Our defense—

[fol. 38] THE COURT: We are at the stage now trying to select a jury in this case. After the determination of that selection if you wish to place as a matter of record your pleas in this case they will be received at that time.

MR. MAYBERRY: I would also like to ask Your Honor that we be given separate tables from the prosecution so that we can confer without being overheard.

THE COURT: We will have the usual procedure that we have here with one side of the table for the defense and the other side of the table for the prosecution.

MR. LIVINGSTON: If Your Honor please, with respect to this matter, Judge Graff made a ruling in this case, and I would ask it continue now, that any conferences between defendants and their advisers be considered as privileged communications even though made in the presence of deputy sheriffs so that they are not [fol. 39] competent to testify. This is a departure from the law. Judge Graff ruled that this privilege would be granted, and I ask this Court to consider the same in view of the fact that they are all together in this matter, and it is highly irregular for a conversation between defendant and adviser to be overheard by a deputy sheriff and be called.

THE COURT: We will not have any deputy sheriff testify to any conversation. However, they will be pres-

ent. They will be present but no deputy sheriff will be called to testify as to any confidential communications between counsel and the respective defendants.

MR. MAYBERRY: Would you also direct them not to converse with others about anything they may hear use discuss, our defense among the defendants. They overheard us speaking about our defense. Will you direct them now not to converse with others about what they may hear us speak?

[fol. 40] THE COURT: At the proper time I will take care of that.

MR. MAYBERRY: And also I would like the record to note there was approximately 15 uniformed police here in the court—

THE COURT: They are not uniformed police. They are deputy sheriffs, officers of this court who have every right to be here.

MR. MAYBERRY: Yes, and I would like to state for the record that it creates prejudice and not being the normal thing to have in the courtroom, that is, to be saturated with uniformed police. You may call them what you want, but they are police. They are uniformed.

THE COURT: They are officers of this court.

MR. MAYBERRY: Yes. So is the District Attorney, and they are still officers. They carry guns—

THE COURT: They do not carry guns.

MR. MAYBERRY: They carry gun belts, let's say [fol. 41] that, with bullets, blackjacks, and all that that makes them law enforcement officers.

THE COURT: Is there anything else you want to say?

MR. MAYBERRY: I would like to have the law enforcement officers wear civilian clothes so the jurors will not be prejudiced against us.

THE COURT: That motion is denied.

MR. MAYBERRY: I would like to ask that the State witnesses be segregated in this case.

THE COURT: That motion is denied.

MR. MAYBERRY: Your Honor, I object to all these overrulings.

THE COURT: You automatically have an exception.

MR. MAYBERRY: I would like to have a fair trial of this case and like to be granted a fair trial under the Sixth Amendment.

THE COURT: You will get a fair trial.

[fol. 42] MR. MAYBERRY: It doesn't appear that I am going to get one the way you are overruling all our motions and that, and being like a hatchet man for the State.

THE COURT: This side bar is over.

MR. MAYBERRY: Wait a minute, Your Honor.

THE COURT: It is over.

MR. MAYBERRY: You dirty sonofabitch.

(End side bar conference.)

* * * *

[fol. 205] MR. MAYBERRY: As far as the record being protected, Your Honor, I will—I would like to pro-

[fol. 206] tect the record, and I would like you to note that we have filed a formal written waiver of our right to counsel, and we have demanded our absolute constitutional right to defend ourselves in persona.

THE COURT: You may proceed.

MR. MAYBERRY: Counsel has been appointed in an advisory capacity.

* * * *

[fol. 1256] BY MR. CODISPOTI:

Q Mr. Carothers, did you have occasion to speak to

[fol. 1257] Dominick Codispoti at any time after June 27th pertaining to this particular charge following the week—that is, after June 27th? And other than the interrogation with Sergeant Anderson?

A I never did.

Q Where was the defendant Dominick Codispoti after he was removed from the observation cell, Mr. Carothers?

MR. MEDONIS: Objection.

THE COURT: Sustained.

(Exception noted.)

BY MR. CODISPOTI:

Q Did you not speak to defendant Dominick Codispoti

in the punishment block approximately three to four days after June 27th?

MR. MEDONIS: Objection.

THE COURT: Sustained.

(Exception noted.)

BY MR. CODISPOTI:

Q Mr. Carothers, have you ever observed Warden Maroney speaking to the defendant Dominick Codispoti at any time other than the time in the hospital during the June evening of June 27, 1965?

THE COURT: Are you saying after June 27, 1965?

MR. MEDONIS: Objection.

THE COURT: Sustained.

[fol. 1258] (Exception noted.)

MR. CODISPOTI: I am asking that question to impeach the witness' credibility, Your Honor.

THE COURT: Go on.

MR. CODISPOTI: Your Honor, am I going to understand that you refuse to allow defendant Dominick Codispoti to ask any questions that will impeach the credibility of the witness for any questions that took place after the arrest?

THE COURT: I am going to prohibit you from asking any questions of things that occurred after June 27, 1965, that is correct.

MR. CODISPOTI: Even for impeachment purposes, Your Honor?

THE COURT: I have answered you.

MR. CODISPOTI: Then I further ask Your Honor in the event that my question is relevant to this situation that happened on June 27, 1965, are you still deny-[fol. 1259] ing me the right to ask the questions?

THE COURT: You will ask it and I will rule on it.

MR. CODISPOTI: Are you trying to protect the prison authorities, Your Honor? Is that your reason?

THE COURT: You are out of order, Mr. Codispoti. I don't want any outbursts like that again. This is a court of justice. You don't know how to ask questions.

MR. MAYBERRY: Possibly Your Honor doesn't know how to rule on them.

THE COURT: You keep quiet.

MR. MAYBERRY: You ought to be Gilbert and Sullivan the way you sustain the district attorney every time he objects to the questions.

THE COURT: Are you through? When your time comes you can ask questions and not make speeches.

* * * *

[fol. 1263] THE COURT: That is correct, Mr. Mayberry, and at the proper time I will state to the jury—at this time I will state to the jury I have no feelings [fol. 1264] about this case. I do have feelings that the contempt that the defendants have shown in this case towards the Court, but at the proper time I will instruct the jury to disregard that and to try his case solely and simply upon the evidence that has been presented in this case.

MR. MAYBERRY: Now, Your Honor, am I to understand that you are holding the defendants in contempt?

THE COURT: I didn't say that.

MR. MAYBERRY: Do I understand you to say that the defendant Mayberry has exhibited contempt for the process of law and justice in this court?

THE COURT: We will take care of that matter at a later stage. Proceed with your cross-examination.

* * * *

[fol. 1382] MR. LIVINGSTON: I would ask Your Honor to repeat in his own words the two alternatives [fol. 1383] that were put to the defendants for the procedure to be followed in this defense.

THE COURT: Well, I have indicated to the defendants before the noon recess that we can proceed in one of two ways. First, that a witness may be called and examined by all three of the defendants in turn as part of their individual cases. That would be one procedure. The other procedure would be to have the witnesses called for each particular defendant in turn, and then have the same witness called for a second and third time, of course, eliminating any questions or testimony that has

been developed or produced for and on behalf of one or the other. By that I mean, that there would be no repetition of the same testimony regardless of the number of times that a witness may be called.

I have also indicated that insofar as a logical sequence is concerned, that it would be preferable to use the first method that has been suggested by the Court. The Court is not going to insist on that, however. If you want to [fol. 1384] use the alternative method the Court will consider that method of approach.

MR. MAYBERRY: I understand. But am I to understand, Your Honor, that by the first suggestion that you made that the defendants will be able to cross-examine the witness also if there is some matter brought out prejudicial on direct examination by Langnes, for instance, and say the witness would bring out something that would be incriminating against the defendant Mayberry or defendant Codispoti, could they in addition to proving their case cross-examine the witness on that particular matter, if it would develop?

THE COURT: Of course, I am going to give you every right that is accorded to you under the law, and if you feel that cross-examination of a particular witness is desired on any particular point, I am going to permit you to do that, keeping in mind, of course, that if you do cross-examine extensively and destroy the veracity or [fol. 1385] credibility of that witness, and then call that witness to testify, you may be hurting yourself.

MR. MAYBERRY: I was referring to witnesses that Langnes may use that neither one of the other defendants may use.

THE COURT: There is no problem there because whatever you are going to develop if proper cross-examination, of course, it will be permitted. You will have the opportunity of cross-examining. I think you should have the right to cross-examine provided it is kept within due bounds, and provided further that you do not intend or attempt by such cross-examination to establish your own defense from it, because that will not be permitted.

In other words, whatever defense you have in this case you will be permitted to produce, but that will be produced by you as an affirmative defense.

MR. LIVINGSTON: In view of the facts that some other remarks prior off the record, it is safe to say that [fol. 1386] the defendants were not forced, and we had the discussion, and these seem to be the two most orderly ways to proceed. They have been offered one of the two alternatives.

THE COURT: That is correct. I would like to ascertain before we actually get into the proceedings a determination as to which of the two methods suggested by the Court the defendants wish to avail themselves.

MR. LIVINGSTON: Defendant Langnes has no preference, and will abide by the ruling of the Court.

MR. CODISPOTI: Is it my understand that each individual in this case has a choice in the matter, and that one—

THE COURT: No. We will adopt as an operating procedure either one of the two methods. We are not going to break it up into two different methods. That will create a chaos.

MR. CODISPOTI: That is what I am trying to find out, Your Honor.

[fol. 1387] MR. MAYBERRY: Defendant Mayberry and defendant Codispoti are in agreement of accepting the first suggestion presented by Your Honor.

THE COURT: Very well. That is that a witness will be called and he will give testimony on behalf of Langnes first for whatever reasons he may wish to call him, and you may follow through as second in the order of presentation and develop from that same witness those matters of defense which you wish to offer and put into evidence, and the same thing for Mr. Codispoti, that he will then follow up with the witness. In that way we can get each witness giving testimony for and on behalf of each one of the defendants in turn so that when we are through with that witness he may be excused.

MR. MAYBERRY: Yes.

MR. SARRAF: Once they are through and leave the stand they won't get back or be called back again?

THE COURT: Normally they will not be called back [fol. 1388] unless there is some matter that may arise in rebuttal or surrebuttal. We are not foreclosing that. Normally the witness would be as in any other case, be excused at the termination of that.

MR. SARRAF: After the three defendants—the three defendants are going to examine and cross-examine the same time the witness is on the stand?

MR. MAYBERRY: Your Honor, if there is something that would be brought out by the Commonwealth on rebuttal, if the Commonwealth does use rebuttal, will we be able to recall a particular witness on surrebuttal?

THE COURT: Absolutely. You have a right of surrebuttal, and you will have the right to call whatever witnesses to establish whatever you wish to establish in surrebuttal. When we talk about rebuttal and surrebuttal, however, let me put it straight on the record now, it is the refutation of a Commonwealth witness that has [fol. 1389] stated a certain fact. You do not call a man for rebuttal to rehash the case. In other words, the rebuttal and surrebuttal are limited to pinpoint testimony saying yes it is so or not so, period. That is it. It has a very limited purpose. Do you understand that?

MR. MAYBERRY: Yes, Your Honor.

THE COURT: All right. Very well then we will proceed.

MR. MAYBERRY: One other matter, Your Honor, that I have been wondering about. May the defendants testify in their own behalf and then testify in behalf of the other defendant, or be called as a witness by the other defendant?

THE COURT: Absolutely. We will permit the right of the three defendants to be called on behalf of one or the other defendant to the extent that it is material to the particular defense involved.

Of course, during the course of the testimony, assuming [fol. 1390] now that you do take the stand, and I am saying to you, also, you do not have to take the stand, but if you do take the stand, and if you have covered on testifying on your behalf that it again would be repetitious simply because one or the other defendant would

be called by another, we will not permit that. Any testimony that may be material to the defense or one or the other, or all three of you, that has not been developed, of course, may be developed, and we will allow that.

* * * *

[fol. 1595] BY MR. MAYBERRY:

Q At the time you made that statement, Mr. DeMino, I understand you were waiting to go outside on a parole, is that correct?

[fol. 1596] A Yes.

THE COURT: You answered that. Don't ask it three times. He answered that.

BY MR. MAYBERRY:

Q How many years had you been in prison at that time?

A Well, close to 15.

Q 15 years straight?

A No.

Q Mr. DeMino, when you made that statement were you acting in a purely voluntary manner?

A Well, I would say I was, but in my mind I was just hoping that maybe I would get out faster on a parole if I made the statement.

Q Did you feel in your mind that if you did not make that statement your parole would be jeopardized?

MR. MEDONIS: Objection.

THE COURT: Sustained.

(Exception noted.)

BY MR. MAYBERRY:

Q Now, Mr. DeMino, in that statement you made there you named the defendant Richard Mayberry as one of the parties participating in the events at the hospital on the night of June 27, 1965. Now, in view of the fact of your previous testimony given here today in this courtroom I ask you now, sir, do you still believe that the [fol. 1597] person you observed that night and the person you indicated in that statement as being a participant,

do you still believe that Richard Mayberry is the one or was the person you seen that night?

A No, I don't.

Q Now, at the time you made that statement, Mr. DeMino, did you feel in your mind that there was a pressure on you to make that statement?

MR. MEDONIS: Objection.

THE COURT: Sustained.

(Exception noted.)

BY MR. MAYBERRY:

Q Is the testimony you have given here in this courtroom in this case the truthful narration of the events as you witnessed them that night?

A As far as my knowledge, yes.

Q Other than the oath that you have taken prior to taking the witness stand to tell the truth, do you feel bound by any other obligation to testify in this matter?

A No. Like I explained about this, this is simply more of a lie that I had heard everybody else mention names down there, and I went along with the name I heard and made the statement and wanting to get out on parole, like I explained.

[fol. 1598] Q Did anyone threaten you in any way to testify in this case for the defendants?

A No. I haven't seen them even until I was brought to court.

Q Directing your attention to the night of June 27, 1965 I would like to ask you, do you recall at the prison hospital when you first seen the defendant Mayberry?

A In the lavatory.

Q Do you recall approximately what time that was?

A No, I couldn't exactly say the time.

Q Could you say whether or not it was after suppertime?

A Yes, it was after suppertime.

Q Now, would you be able to say whether or not it was after 6:00 p.m. in the evening?

A No, I couldn't say for sure.

Q At the time you seen the defendant Mayberry in the lavatory of the general ward at the prison hospital, do you recall hearing gunshots or explosions prior to that time?

A That was a lot of commotion out there, and that is when everybody ran toward the lavatory.

THE COURT: Prior to what time? Prior to your—

MR. MAYBERRY: Prior to the first time he seen me [fol. 1599] in the prison lavatory in the hospital.

THE COURT: Do you understand the question?

A Yes, sir.

THE COURT: You may give your answer.

A Well, there was a commotion outside that sounded like shots, and four or five fellows ran toward the lavatory, and that is the first time I seen Mr. Mayberry.

BY MR. MAYBERRY:

Q Do you recall the State police firing into the general ward of the hospital that night?

A No, but I heard the shot, and I heard the window break. I was behind the lavatory at the time, and I couldn't see too well out into the ward.

Q Do you recall inmate patients in the general ward running into the lavatory to take cover from gunfire?

A Yes, that is what I recall.

Q Would it be a correct summary of your testimony in defense of Mr. Langnes to say that you were in the prison hospital on the night of June 27, 1965, and you observed a convict with red hair and another person described by the name or nickname of Butch Rizzo in the lavatory at the same time?

A Yes.

[fol. 1600] Q And that Langnes then entered?

A Yes.

Q And that an argument ensued between Langnes and this red haired prisoner?

MR. MEDONIS: Objection.

THE COURT: What is the purpose of this?

MR. MAYBERRY: It is the point when he seen me.

THE COURT: Ask the proper questions. You don't

have to ask questions as far as a correct summary as it relates to Langnes. Relate them to you.

MR. MAYBERRY: I am trying to develop when I first appeared prior to this—

THE COURT: Then develop those and forget what Langnes—forget the correct summary insofar as Langnes is concerned.

MR. MAYBERRY: Well, Your Honor, to make it clearer, this was in an extended examination by defendant Langnes, and to make it more clear I want to show [fol. 1601] when I was first seen in this location.

THE COURT: I think it is very clear when you were according to the testimony of this witness. You appeared the second time when Langnes went into the lavatory. That is what has been testified to. It is very clear. Now proceed with your questioning. Let's not draw it out on unnecessary details.

(Exceptions noted.)

BY MR. MAYBERRY:

Q Now, when you first seen Mr. Richard Mayberry in the lavatory of the general ward at the prison hospital, did you notice if I was wearing prison clothes at the time?

A Yes, brown clothes on, yes.

Q Now, at any time while you observed me in this location did you notice whether or not I had in my possession the exhibits that you previously looked at?

A No, you didn't have anything on you.

Q I am referring to the zip guns, the bombs—

A I didn't see anything in your possession when you came into the lavatory.

[fol. 1602] Q Can you recall approximately how long we were in this lavatory?

A I would say about a half hour.

Q Do you recall whether or not you seen the defendant Richard Mayberry in the presence of Officer Walz on the night of June 27, 1965 at the prison hospital?

A No. The first time I seen you was when you entered the lavatory.

Q Did you see Officer Walz in the prison hospital that night?

A Yes, I seen him when I first went into the lavatory sitting at the desk.

Q Do you recall if at the time you observed him whether or not he was tied up?

A I didn't pay that much attention to him because I was just going to the lavatory, and it was like another officer sitting there. You see a lot of officers sitting there, you know.

Q Did you notice when you observed Mr. Walz if he appeared to be in a normal condition?

MR. MEDONIS: Objection.

BY MR. MAYBERRY:

Q By that I mean, did he appear like—

THE COURT: Ask him how he appeared. I am not [fol. 1603] sure at this stage whether you are calling this witness in your own behalf or you are cross-examining this witness.

MR. MAYBERRY: I am calling this witness in my own behalf, Your Honor.

THE COURT: All right. Of course, let's eliminate the leading questions.

MR. MEDONIS: I didn't hear the district attorney object to leading questions on my part, Your Honor.

THE COURT: We have been permitting a lot to go into the record. Go on.

BY MR. MAYBERRY:

Q Now, Mr. DeMino, did you observe Officer Ferrara on the night of June 27, 1965?

THE COURT: He answered that.

MR. MAYBERRY: I haven't asked him the question before this time.

THE COURT: Are you going to get a different answer? We will let you ask it, but I thought we understood that you were not going to repeat the same infor- [fol. 1604] mation elicited by another defendant.

MR. MAYBERRY: I am not trying to. Insofar as it relates to me, though, I feel it is critical.

THE COURT: We will have him state again.

BY MR. MAYBERRY:

Q Did you ever see me in the presence of Officer Ferrara?

A No, I didn't.

Q At the time you observed me in the prison hospital on the night of June 27, do you know of your own knowledge whether or not I was making any attempt to escape from the prison?

MR. MEDONIS: Objection.

THE COURT: We will let him answer the question, because it is whether he knows of his own knowledge.

(Exception noted.)

A No, I don't.

BY MR. MAYBERRY:

Q Could you say approximately how far the prison hospital is from the wall of the prison?

A About 20 feet, I would say.

Q Would it be possible for a human to jump from [fol. 1605] the hospital on to the wall?

A No.

MR. MEDONIS: Objection. Wait a minute.

THE COURT: We will sustain that.

(Exception noted.)

BY MR. MAYBERRY:

Q Now, at the time you were in this lavatory at the prison hospital, and while you observed the defendant Mayberry in this lavatory, do you recall any tear gas bombs being thrown into the lavatory?

A Yes, there was one throwed at the lavatory door there.

Q And what happened to this tear gas bomb that was thrown in there?

A A lot of smoke was coming—

THE COURT: We will not permit the witness to rehash what he testified to before. Go on to something else.

BY MR. MAYBERRY:

Q What was done with this bomb that was thrown in there?

A You reached up and picked it up and threw it back out the window.

Q Now, before I threw this tear gas bomb back out [fol. 1606] of the lavatory, did you notice whether or not my hands were injured at the time?

A I didn't notice anything about you.

Q Did you notice whether or not after I threw this bomb out if I was injured in any way?

A No, I couldn't say if you was or not. Are you referring to the tear gas bomb?

Q Yes.

A Yes. I know you was holding your hand under the sink after you threw the bomb out. I don't know if you hurt your hand or not. I know you were holding your hand out and wrapped it in a towel.

Q Now, this tear gas bomb that you seen me throw out of the lavatory, are you sure that it came from outside the lavatory into the lavatory?

A It bounced right at the door of the lavatory door. You couldn't. It sticks up 6 to 8 inches, and somebody was hollering there was an old man there 82 years old where the bomb hit, and this man was a heart patient at the time, and hollered to get that bomb out of there, and you reached and threw it back out.

Q I ask you, Mr. DeMino, are you positive that this bomb was thrown from outside the lavatory into the lava- [fol. 1607] tory and not from inside the lavatory first?

MR. MEDONIS: I understand Mr. Mayberry's position now that this is direct, and I think he is leading.

THE COURT: Obviously he has been leading. I was waiting for an objection, but we will let him testify unless there is an objection.

MR. MEDONIS: I raise the objection now, Judge.

THE COURT: We will sustain the objection.

(Exception noted.)

BY MR. MAYBERRY:

Q Did you see where this tear gas bomb came from?
A It came from outside the hospital corridor there. That is the only place it could have come from. Nobody—
THE COURT: Did you see where it came from?
A From outside the hospital ward.
THE COURT: You saw it?
A I seen it land there.

[fol. 1608] BY MR. MAYBERRY:

Q Would you remember—I withdraw that—
THE COURT: We will take a ten minute recess at this time, ladies and gentlemen.

(Thereupon a recess was had at 10:40 a.m.)

(After recess at 11:00 a.m.)

HAROLD DeMINO, resumed the stand and testified further as follows:

DIRECT EXAMINATION (Cont'd)

BY MR. MAYBERRY:

Q Now, Mr. DeMino, after you seen the defendant Mayberry throw this tear gas bomb back out of the lavatory, what did you next observe?
A Well, there was a lot of hollering and people yelling out there, and a lot more gas going around, thrown in, and everybody got in a panic and started to rushing out the doors. I heard a lot of windows broke out for air to get in, and everybody was rushing to get out.
Q Do you recall seeing the defendant Mayberry when he left the general ward that night?
[fol. 1609] MR. MEDONIS: Wait a minute, objection.
THE COURT: Let him answer that question.
A Yes, I seen you come out with everybody else, and ran out of the bathroom.
THE COURT: That is not the question.
A Yes.

THE COURT: Repeat the question.

(Last question read by reporter.)

A Yes, I did.

MR. MAYBERRY: I would ask Your Honor not to badger the witness. He is trying to—

THE COURT: You let me handle my share of it, and you handle yours.

MR. MAYBERRY: I am trying to do that, Your Honor.

THE COURT: All right. Don't try to be judge at the same time. Just handle your case. I will be the judge.

BY MR. MAYBERRY:

Q Do you recall how many patients were in the general ward on the night of June 27, 1965 when these tear gas bombs were thrown in?

[fol. 1610] MR. MEDONIS: Objection.

THE COURT: Sustained. He answered that once before. We are not going to have these repetitions and prolonging this thing. I want this over with.

(Exception noted.)

BY MR. MAYBERRY:

Q Do you recall, Mr. DeMino, the names of any of these patients that were in that general ward that night when the tear gas and gunshots were fired in there?

A A few names I recall.

Q Would you name them off for me now?

A The nickname I heard was in the lavatory, and that was Flat-top.

MR. MEDONIS: Objection.

THE COURT: We will let him go ahead.

(Exception noted.)

A The other name was Butch Rizzo, and Red was there, and one of the other nurses that I know was up there, Larry Magnus.

BY MR. MAYBERRY:

Q Now, this name Butch Rizzo, do you know if this is the true name of the person?

A No, I don't know the person at all. I know him [fol. 1611] by the nickname and to see him. I am not acquainted with him personally, just know him to see him.

Q Could you describe this Butch Rizzo?

A Well, he is about 5 foot 9, pretty well built, short wiry hair, ruddy complexion.

Q What color hair?

A Red, sort of reddish—reddish brownish.

Q Now, Mr. DeMino, when you left the hospital general ward on the second floor on the night of June 27 did you observe the police officers who were present at that time?

A No, I didn't observe them, but I know there was a lot of police there at the time.

Q Did you see any persons dressed in the uniform of police or prison guards outside the general ward that night?

A Yes, as we came out the general ward, yes, there was prison guards out there and some State troopers.

Q Did you observe the defendant Mayberry being taken into custody that night?

A No. As you came down the steps with me they grabbed you going down the steps, and I didn't know where they took you or anything, but I know they hussled you down the steps in a rough way, and I didn't see you no more.

Q Now, at the time you seen me being taken down [fol. 1612] the steps from the second floor to the first floor of the hospital can you say approximately how many police were escorting me at that time?

MR. MEDONIS: Objection.

THE COURT: Sustained.

(Exception noted.)

BY MR. MAYBERRY:

Q Did you see any police escorting me at that time?

A I seen them grabbing you as you went down the steps. They had about seven or eight. They weren't police. There were prison guards of the prison lining the steps watching everybody who came down the steps.

Q Now, will you describe the manner in which I was taken to the first floor from the second floor in the prison hospital?

MR. MEDONIS: Objection.

THE COURT: Did you see the defendant Mayberry taken from the second floor to the first floor all the way?

A I seen him taken down the steps from the first flat landing of the steps.

THE COURT: Where were you at the time?

A I was coming down right behind him.

THE COURT: You saw him then?

A Yes.

[fol. 1613] THE COURT: We will let him answer the question.

(Exception noted.)

A I seen when they grabbed you at the second flight of the steps, and they were pulling on you and dragging you down the steps, and I was choking on the gas myself at the time, and I passed out at the bottom of the steps and was carried out into the yard.

BY MR. MAYBERRY:

Q Did you notice whether or not there was any fighting going on as I was being taken down the steps?

MR. MEDONIS: Objection.

THE COURT: Sustained.

(Exception noted.)

BY MR. MAYBERRY:

Q Did you notice whether or not the officers that were escorting me had clubs in their hands?

MR. MEDONIS: Objection.

THE COURT: Sustained.

(Exception noted.)

BY MR. MAYBERRY:

Q I would like you to describe specifically and in de-
[fol. 1614] tail the manner in which I was taken from the ward to the first floor of the hospital.

MR. MEDONIS: Objection.

THE COURT: Let him answer that.

(Exception noted.)

A Well, you ran out of the—we all didn't run, but was hussled, moved fast out of the ward to get down to the steps into some air, and as we were coming down the steps the guards were lined up on the steps. At that time all the guards had clubs in their hands because of the attempted prison breach. They were excited and everybody had clubs and guns there. I was pretty well choking with the gas, and you were ahead of me, and I seen them grab you and push and throw you down the steps, and everybody was pushing and shoving going down the steps. I don't know where they took you, and I passed out unconscious at the bottom of the steps and was taken out and revived in the air.

BY MR. MAYBERRY:

Q Did you notice any State police present at that time?

MR. MEDONIS: Objection.

THE COURT: Sustained.

(Exception noted.)

[fol. 1615] BY MR. MAYBERRY:

Q Do you know Trooper Spong of the Pennsylvania State Police?

A No, I don't know him by that name.

Q Did you observe the defendant Mayberry fighting with the State police that night at any time?

MR. MEDONIS: Objection.

THE COURT: Sustained. He already covered what he observed. Now, let's go on.

(Exception noted.)

BY MR. MAYBERRY:

Q Did you notice whether or not the defendant Mayberry was resisting arrest or resisting the officers that were escorting him to the first floor?

MR. MEDONIS: Objection.

THE COURT: Sustained.

(Exception noted.)

BY MR. MAYBERRY:

Q How was the defendant Mayberry acting at the time you observed him being taken down to the first floor of the prison hospital?

MR. MEDONIS: Objection.

THE COURT: Sustained.

(Exception noted.)

[fol. 1616] MR. MAYBERRY: Your Honor, the State witness, Trooper Spong, has testified that I fought him to the first floor.

THE COURT: No speeches. I have ruled.

MR. MAYBERRY: I have a right to impeach.

THE COURT: We will not hear any speeches from you, Mr. Mayberry. I ruled on the question.

MR. MAYBERRY: There are two sides to this controversy, and I wish to present mine. May I?

THE COURT: In the event that it is proper we will give you every latitude to do so. To the extent that it is improper we will stop you.

MR. MAYBERRY: Are you refusing me to present witnesses who will contradict the Commonwealth witnesses, Your Honor.

THE COURT: No, I am not. I told you that repeat-[fol. 1617] edly. We are not going on with this. Go on with your questioning.

MR. MAYBERRY: May I question this witness, Your Honor, concerning the contradiction between the trooper—

THE COURT: Go on and ask your questions, Mr. Mayberry.

BY MR. MAYBERRY:

Q At the time, Mr. DeMino, you observed the defendant Mayberry being taken to the first floor of the prison hospital, did you observe if he had anything in his hands at the time?

A No, I don't think he did.

Q Do you recall, Mr. DeMino, at the time I was being taken to the first floor of the hospital whether or not I was fighting with any State troopers?

MR. MEDONIS: Objection.

THE COURT: We sustained that for the third time now.

(Exception noted.)

MR. MAYBERRY: On what grounds?

THE COURT: The objection is sustained. Go on.

[fol. 1618] MR. MAYBERRY: I thought the trial was to develop the truth of the matter, Your Honor. I would like to know how I am going to be able to impeach the Commonwealth witnesses to show the contradiction if I can't ask my witness what he observed on the stairway leading to the first floor that night.

THE COURT: We covered that matter. Ask your questions.

BY MR. MAYBERRY:

Q Now, these two persons you identified as Butch Rizzo and the convict in the white clothes wearing red hair, these two separate individuals, did you ever hear them give any information to the prison authorities concerning the defendant Mayberry?

MR. MEDONIS: Objection.

THE COURT: We will allow the question.

A Yes. Like everybody else—like I told you before, at the time they were in the hospital everybody had given a statement as to what happened.

BY MR. MAYBERRY:

Q Will you describe, Mr. DeMino, the time and location when you observed these two individuals speaking to prison authorities?

[fol. 1619] THE COURT: He didn't say he spoke to them. He said they gave statements.

BY MR. MAYBERRY:

Q Were these statements given by this Butch Rizzo and this red haired convict spoken statements, verbal statements?

A Well, they were verbal. I don't know if they were written or not.

THE COURT: Were you present, sir?

A I was at the prison hospital present when they talked to all patients up there.

THE COURT: Were you present when these people were supposed to have talked to the authorities?

A Yes, they were all present.

THE COURT: Were you present?

A At the hospital, yes, sir.

MR. MAYBERRY: For the record I object to Your Honor repeatedly taking examination of the witness out of the hands of the defendant and interfering with the development of—

THE COURT: You have the objection on the record. Now let's go on.

[fol. 1620] BY MR. MAYBERRY:

Q Now, Mr. DeMino, do you know of your own knowledge whether or not these two convicts, Butch Rizzo and the redheaded person, implicated Richard Mayberry as a participant in that incident of June 27, 1965?

A Yes. When they spoke to the prison officials your name was mentioned.

Q Did you hear these two convicts make any incriminating statement against the defendant Mayberry?

MR. MEDONIS: Objection.

MR. MAYBERRY: This is not for the truth or falsity, but merely to prove it was said.

THE COURT: I take your question to mean did you hear any statements made by these two inmates.

MR. MAYBERRY: Against the defendant Mayberry.

THE COURT: Yes, you asked that before. Did you

hear any statements given by these two inmates against Mr. Mayberry?

A No, I heard the verbal conversation with the prison [fol. 1621] officials, I mean, at the time, but I mean, I didn't see any written statements they made or anything.

BY MR. MAYBERRY:

Q I am referring to statements, Mr. DeMino, either verbal—

A Yes, verbal.

Q —or written, either way.

A Verbal.

Q Now, Mr. DeMino, do you know of your own knowledge whether or not these two convicts were used by the prison authorities as informers?

MR. MEDONIS: Objection.

THE COURT: Sustained.

(Exception noted.)

BY MR. MAYBERRY:

Q Do you know of your own knowledge, Mr. DeMino, if the prison authorities acted upon the information given by these two convicts against the defendant Mayberry?

MR. MEDONIS: Objection.

THE COURT: We will allow that.

(Exception noted.)

THE COURT: Do you know of your own knowledge?

BY MR. MAYBERRY:

Q Do you know of your own knowledge if the prison [fol. 1622] authorities took any action such as confining the defendant, punishing—

THE COURT: Wait a minute.

BY MR. MAYBERRY:

Q Do you know of your own knowledge whether or not the prison authorities took any action as a result of the information given to them by the informers?

A I think they took the action—

THE COURT: Not what you think. Do you know as a result of the conversations whether or not the prison authorities took any action?

A I would say to my knowledge, yes.

BY MR. MAYBERRY:

Q And would you describe, Mr. DeMino, the nature of this action taken by the prison authorities, what it consisted of, if you know?

MR. MEDONIS: Wait a minute. I think this is objectionable.

THE COURT: Well, of course, it presupposes that this witness had to be present. If he was not, it is objectionable. Were you present there after?

A No, I was just present when they were—

[fol. 1623] THE COURT: We sustain the objection.

(Exception noted.)

BY MR. MAYBERRY:

Q Do you know, Mr. DeMino, where the defendant was confined following this incident?

MR. MEDONIS: Objection.

THE COURT: Sustained.

(Exception noted.)

BY MR. MAYBERRY:

Q Do you know, Mr. DeMino, if the prison authorities punished the defendant Mayberry because of information they received from these informers?

MR. MEDONIS: Objection.

THE COURT: Sustained.

(Exception noted.)

BY MR. MAYBERRY:

Q Do you know of your own knowledge, Mr. DeMino, whether or not—I withdraw that question—I would like to ask you, Mr. DeMino, during the ten minute recess has anyone spoken to you about your testimony in this case?

A No, they haven't.

Q Now, Mr. DeMino, I would like to ask you if you know of your own knowledge whether or not there is a [fol. 1624] deep and well settled hatred on the part of the prison officials for the defendant Mayberry?

MR. MEDONIS: Objection.

THE COURT: Sustained.

(Exception noted.)

BY MR. MAYBERRY:

Q Do you know of your own knowledge, Mr. DeMino, if at the time of June 27, 1965 there existed a deep and well settled hatred on the part of the prison officials for the defendant Mayberry?

MR. MEDONIS: Objection.

THE COURT: Sustained.

(Exception noted.)

BY MR. MAYBERRY:

Q Do you know of your own knowledge, Mr. DeMino, whether or not Richard Mayberry was framed on these charges by the prison authorities?

MR. MEDONIS: Objection.

THE COURT: Sustained.

(Exception noted.)

MR. MAYBERRY: Do I have a continual exception for every time you sustain an objection by the district [fol. 1625] attorney, Your Honor?

THE COURT: Yes. I have explained that to you before, Mr. Mayberry.

MR. MAYBERRY: That wasn't my question, Your Honor. I asked did I have an exception.

THE COURT: Go on.

BY MR. MAYBERRY:

Q Do you know of your own knowledge, Mr. DeMino, whether or not the prison authorities had Richard J. Mayberry entrapped into this crime?

MR. MEDONIS: Objection.

THE COURT: Sustained.

(Exception noted.)

MR. MAYBERRY: Your Honor, do I understand you are refusing me to produce the defense of entrapment?

THE COURT: No, I am not refusing you. I just sustained an objection to a question which you have asked.

[fol. 1626] MR. MAYBERRY: I would like to consult with my legal adviser Mr. Sarraf.

BY MR. MAYBERRY:

Q Now, Mr. DeMino, you have stated that you observed this Butch Rizzo and this redheaded inmate talking to the prison guards or officials. Did you hear the words that were spoken between these informers and the prison guards or officials?

A No, I didn't hear the conversation.

MR. MEDONIS: Objection.

THE COURT: He answered the question that he did not hear the conversation.

BY MR. MAYBERRY:

Q Do you know, Mr. DeMino, of any hatred on the part of the prison authorities toward the defendant Mayberry?

MR. MEDONIS: Objection.

THE COURT: We have already sustained that objection.

(Exception noted.)

BY MR. MAYBERRY:

Q Do you know, Mr. DeMino, of any antagonism on the part of the prison authorities toward the defendant Mayberry?

MR. MEDONIS: Objection.

THE COURT: Sustained.

[fol. 1627] (Exception noted.)

BY MR. MAYBERRY:

Q Have you ever seen any hatred and antagonism or

hostility displayed toward the defendant Mayberry by the prison authorities?

MR. MEDONIS: Objection.

THE COURT: Sustained.

(Exception noted.)

MR. MAYBERRY: Now, I'm going to produce my defense in this case and not be railroaded into any life sentence by any dirty, tyrannical old dog like yourself.

THE COURT: You may proceed with your questioning, Mr. Mayberry.

* * * *

[fol. 1792] BY MR. MAYBERRY:

Q And is the area where you observed the three defendants open and freely accessible to any prisoner in that penitentiary?

MR. MEDONIS: Objection.

THE COURT: We will let him answer that.

(Exception noted.)

A No.

BY MR. MAYBERRY:

Q No? I refer to the area, the handball court area. Is that area open to any prisoner in the penitentiary who cares to go to that area?

MR. MEDONIS: He answered the question.

MR. MAYBERRY: He hasn't understood the area, obviously.

BY MR. MAYBERRY:

Q I ask you, Mr. Nardi, is that area, the handball court, is it open to any prisoner who wants to play handball, who cares to go to that area to play handball?

A Yes.

Q Did you understand the prior question when I asked you if it was freely open and accessible area?

THE COURT: He answered your question. Let's go on.

[fol. 1793] MR. MAYBERRY: I am asking him now if he understands—

THE COURT: He answered it. Now, let's go on.

MR. MAYBERRY: I ask Your Honor to keep your mouth shut while I'm questioning my own witness. Will you do that for me?

THE COURT: I wish you would do the same. Proceed with your questioning.

* * * *

[fol. 1834] November 29, 1966
Pittsburgh, Pennsylvania

MR. MAYBERRY: Defendant Mayberry would like to put something on the record before we proceed. At the present time I am being held incommunicado at the prison in an underground dungeon without clothing, bed-[fol. 1835] ding, or nothing. I can't write any letters, petitions, and I am not allowed to receive any visits. This is interfering with my right to a fair trial because I am unable to prepare my legal papers due to the fact that the prison authorities have taken them away from me and not letting me have them except when I come to the court in the morning.

Now, I am being unduly harassed by being held continually in this underground dungeon; in jeopardy of my life by high pressure steam and water lines. I have no facilities for writing, denied my legal papers, and I have not been given any outdoor exercises. This is nothing but a way of harassing and distracting me from my defense to these serious charges and in preparing any interrogation on the charges on trial.

THE COURT: You made that statement yesterday.

MR. MAYBERRY: You said this was a court of law. [fol. 1836] I'm entitled to a fair trial or I wouldn't bring it up.

THE COURT: You have been here during the day and we usually adjourn court around 4:00 o'clock, and then you are returned to the State Correctional Institution, and you are brought back in the morning—

MR. MAYBERRY: Without my papers, though. When I am returned they take my papers and put me in a barestone underground cellar.

THE COURT: That is your statement and a collateral issue we are not going into. Proceed.

MR. LANGNES: I want to put something on the record before we proceed, if I may.

THE COURT: You may.

MR. LANGNES: Going yesterday, going back to the Western Penitentiary I asked the sergeant on the Home Block for my legal papers, and for my regular privileges, [fol. 1837] and he told me that Mr. Maroney gave him direct orders that I don't get nothing, and he doesn't give a damn whether or not I have a fair trial or not. I want that on the record. I want to subpoena Sergeant Peterson of the Home Block, and I want to subpoena Mr. Maroney for—

THE COURT: You already subpoenaed Superintendent Maroney as your witness, so he will be available for you at the proper time.

MR. LANGNES: Can I subpoena Sergeant Peterson?

THE COURT: We are not going into any collateral issues here. What may or may not be said by others has nothing to do with this. The question is whether or not a proper and fair trial is given to you in this court. You have a right to object to anything that you think is improper as to matters that occur in court. As to what [fol. 1838] happens after you leave the courtroom and then taken back to the prison is a matter that has to be taken up with the prison officials.

MR. MAYBERRY: But when it interferes with my right to a fair trial—

THE COURT: I don't see that it does.

MR. MAYBERRY: I can't prepare my legal papers.

MR. LIVINGSTON: I have been asked by defendant Langnes to make a motion at this time in which the Court is being asked to direct the prison authorities to allow these defendants to at least have their legal documents wherever they are confined. I think they are entitled to that and ask the Court for it.

MR. MAYBERRY: I have a Federal court order ordering the prison authorities not to take my legal papers away from me no matter where I am, and they are in [fol. 1839] direct violation with the Federal court order.

THE COURT: I suggest you take it up with the Federal court.

MR. MAYBERRY: You're a judge first. What are you working for? The prison authorities, you bum?

MR. LIVINGSTON: I have a motion pending before Your Honor.

THE COURT: I would suggest—

MR. MAYBERRY: Go to hell. I don't give a good God damn what you suggest, you stumbling dog.

MR. LIVINGSTON: I have a motion pending before Your Honor in reference to Langnes being permitted to have access to legal papers out of the courtroom.

MR. CODISPOTI: Defendant Dominick Codispoti—

MR. LANGNES: Let him—

[fol. 1840] THE COURT: I am not going to interfere in any matters—with the rules and regulations of the prison authorities.

MR. LANGNES: Let me state this—

MR. LIVINGSTON: Your Honor, is the motion then denied?

THE COURT: The motion is refused.

MR. LANGNES: Let me state this, Your Honor: If I can't get my rights legally, then I warn you that I will get my rights illegally, or any way I can. If I have to blow your head off, that's exactly what I'll do. I don't give a damn if its on the record or not. If I got to use force, I will. That's what the hell I'm going to do.

THE COURT: That's the end of this.

MR. CODISPOTI: Defendant Dominick Codispoti in this case is facing life imprisonment and states for the [fol. 1841] record that since the commencement of this trial he has been able to review his case each evening with the help of his legal papers. Now, because of the incident that occurred over the past weekend he has been deprived of his right to review the entire day's proceedings and lay out his strategic plans for the following

day because the prison officials have been confiscating his legal material.

In view of that fact he asks this Court to issue an order restraining the prison officials from interfering with his right to a fair trial in that they are depriving him of his legal papers and because of this he is unable to present a proper defense, and this is in direct violation of due process of law as guaranteed by the 14th Amendment.

I want this placed on the record, and I want the jury in this case to realize that if there are any outbursts by the defendant it is only because the defendants in this [fol. 1842] case will not sit still and be kowtowed and be railroaded into a life imprisonment.

MR. MAYBERRY: You started all this bullshit in the beginning.

THE COURT: You keep quiet.

MR. MAYBERRY: Wait a minute.

THE COURT: You keep quiet.

MR. MAYBERRY: I am my own counsel.

THE COURT: You keep quiet.

MR. MAYBERRY: Are you going to gag me?

THE COURT: Take these prisoners out of here. We will take a ten minute recess, members of the jury.

(Thereupon court 9:50 a.m.)

(During recess before the jury entered the courtroom.)

THE COURT: While counsel are present in court I [fol. 1843] want the record to show that I have spoken to Superintendent Maroney, and while there may have been just grounds for taking the papers from these prisoners yesterday evening, I have instructed Superintendent Maroney to turn over those papers to them at the end of the day so that they may have them at the State Correctional Institution. He is to take their receipts showing that these papers have been turned over to them, and they will be checked in the following morning. That is all I want to say at this time.

* * * *

[fol. 2192] THE COURT: You may proceed with the witness, Mr. Mayberry.

MR. MAYBERRY: I don't want to cross-examine the witness, but I would like to call him as my own witness.

[fol. 2193] THE COURT: We will permit you to do that at a later time.

* * * *

[fol. 2200] THE COURT: Are you cross-examining now?

MR. MAYBERRY: Well, I didn't know what you would call this, but I have one question concerning—

THE COURT: You can call this witness in your own behalf if not for cross-examination.

BY MR. LIVINGSTON:

Q I have one question, Mr. Langnes. You have heard [fol. 2201] the Commonwealth's witnesses testify about a prison breach?

A Yes, sir.

Q You were here in court when they testified?

A Yes, sir.

Q Did you take part in any way in that prison breach?

A No, sir.

MR. CODISPOTI: I have one question I would like to ask.

THE COURT: Are you going to cross-examine this witness?

MR. CODISPOTI: Strike that, no.

THE COURT: You may step down.

MR. MAYBERRY: I would call defendant Langnes as my witness now, as a defense witness in my behalf.

THE COURT: We will proceed to determine what Mr. Langnes wants to do because we set this up that when it comes your turn outside of any witness you may wish to call, you may call Mr. Langnes at that time.

[fol. 2202] MR. LANGNES: I am in agreement.

MR. MAYBERRY: On defense I reserve the orderly presentation of my defense to call him while he is available to take the stand, and not now when he was on the stand

in his own behalf. I didn't cross-examine, but I want to bring for the—

THE COURT: We will permit it at the proper time. You may take your seat. Call your next witness, Mr. Langnes.

* * * *

[fol. 2218] MR. MAYBERRY: Defendant Mayberry has something he would like to find out from the Court. You have agreed—you have given us two alternatives in this case, to call our witnesses one by one as to each of our defenses, and give each defendant a chance to cross-examine those witnesses, and then you have given us another alternative that we put one witness on the stand and each one of us will question him as to our defense while still on the stand. Now when defendant Langnes took the stand in his own behalf and I wanted to question him as to defense you refused me at that time to use Mr. Langnes as a defense witness.

[fol. 2219] THE COURT: That is correct.

MR. MAYBERRY: This is contrary to your prior proposal.

THE COURT: No, it is not. It is your idea it is contrary, but actually it is not, because before you got into your defense outside of the common witnesses we will permit Mr. Langnes to finish up. Any other witnesses you may call on behalf of yourself. You will be permitted to do so, so there is no inconsistency there. Let's go on. Take the stand, Mr. Codispoti.

MR. MAYBERRY: Do I understand this, Judge Piok, that any other witnesses that defendant Langnes makes use of, may I also use that as a defense witness in my case?

THE COURT: That is consistent with what we have been doing.

MR. MAYBERRY: Why wasn't I permitted—

[fol. 2220] THE COURT: Because Mr. Langnes was not finished with his defense.

MR. MAYBERRY: But we have been using the same witnesses all along here.

THE COURT: Right. You don't understand, do you?

MR. MAYBERRY: No.

THE COURT: All right. We are going on as we started. Take the stand, Mr. Codispoti.

MR. MAYBERRY: I would like to know when I may be permitted to call Mr. Langnes as my witness.

THE COURT: We will let you know.

DOMINICK JOHN CODISPOTI, resumed the stand and testified further as follows:

DIRECT EXAMINATION (Cont'd)

BY MR. LANGNES:

Q Mr. Codispoti, concerning this conversation between [fol. 2221] you and the defendant Langnes, first of all, was anybody else present?

A I believe so.

Q Do you know who?

A I am not sure of the name. I do know the person by nickname.

MR. MAYBERRY: Are you going to have me wait until defendant Langnes is all through with his witnesses before I can present my defense?

THE COURT: I have answered that. Now let's stop this, and go on.

MR. MAYBERRY: No. I don't understand. I want to know how I will proceed.

THE COURT: We will permit this witness to testify. Proceed.

* * * *

[fol. 2264] MR. MAYBERRY: Wait a minute. Am I permitted to make use of Mr. Codispoti, to call Mr. Codispoti as a witness, or am I—

THE COURT: Do you want to cross-examine at this time?

MR. MAYBERRY: I was under the impression, Your Honor, I would be allowed to make use of the same witness as long as it related to my defense.

THE COURT: At the proper time.

MR. MAYBERRY: When you say the proper time, [fol. 2265] could you be a little more specific in that, Your Honor, so I can understand what you mean. If I—

THE COURT: As soon as Mr. Langnes is finished with his case you may call whatever witness—

MR. LANGNES: You wouldn't let me present my case, Your Honor. How the hell can I finish it?

MR. MAYBERRY: Your Honor, defendant Mayberry would like to understand this setup a little more clearly. I was under the impression from what Your Honor said earlier I would be allowed to make use of the same witness to present my defense as defendant Langnes makes use of the witness as soon as he is finished rather than have to call back the same witnesses that he has called. That is what you have told us earlier. Is that still the same understanding?

THE COURT: Yes. You may call Mr. Codispoti in [fol. 2266] your defense after Mr. Langnes has rested his side.

MR. MAYBERRY: As to the other defense—

THE COURT: You will be permitted to examine as heretofore.

Members of the jury, we will take a recess at this time.

* * * *

[fol. 2275] THE COURT: Who is your next witness, Mr. Langnes?

MR. LANGNES: I call defendant Mayberry.

THE COURT: Before you call Mr. Mayberry has Kenneth Souders been brought up yet? We will have you call Kenneth Souders.

MR. LANGNES: I have specific reasons for calling Richard Mayberry first.

THE COURT: I know that. You stated you desired Kenneth Souders this morning, and accordingly it was directed that Kenneth Souders be produced.

MR. LANGNES: Since then I had to put other [fol. 2276] witnesses on.

THE COURT: Yes, because you called him. He is up here. Now he is here and we will call him.

MR. LANGNES: I don't care to call him at this time, Your Honor.

THE COURT: He will be called.

MR. LANGNES: Presently then I won't make use of him in that case.

THE COURT: You don't wish to call him?

MR. LANGNES: I want Mr. Mayberry first.

THE COURT: You do not wish to call him? He is now in court and available.

Mr. LANGNES: Not at this time.

THE COURT: No. He has been called at your request to be brought up from the State Correctional Institution. You made that request this morning. He has now been produced, and he will be called.

[fol. 2277] MR. LANGNES: Kenneth Souders is not here at this time, and I have no intention of using him at this time, and I would like to call defendant Mayberry first.

THE COURT: All right. Let the authorities return Mr. Kenneth Souders back to the State Correctional Institution upon a showing that Kenneth Souders is not going to be used.

MR. LANGNES: Not at this time, Your Honor.

THE COURT: No, no. Are you going to use him? He is here.

MR. LANGNES: I'm going to use him, yes, sir.

THE COURT: Call him and we will put him on the stand.

MR. LANGNES: Your Honor, like I stated, I am going to use the defendant—

THE COURT: You are going to use him right now, sir. Now let's have no more.

[fol. 2278] RM. LANGNES: I will not use him at this time.

THE COURT: He will be called, and if you want to examine he will be examined. If not, we will excuse the witness.

KENNETH SOUDERS, a witness called on behalf of the defense, having been duly sworn according to law, testified as follows:

DIRECT EXAMINATION

MR. LANGNES: Your Honor, before I examine the witness I request a chance to talk to him for I haven't seen the witness for over a year. I want to recollect his memory, and I believe the prosecution has that right, and I believe I also should have that right. I ask for at least a half hour.

THE COURT: Now, you stated specifically the rea-
[fol. 2279] son he was going to be called. Proceed with your examination.

MR. LANGNES: Your Honor, I refuse to be forced to question the witness before I have a chance to talk to him. I feel it is my right to talk to the witness to recollect if his memory so I will know—so that he will give truthful testimony.

THE COURT: Well, you apparently knew what he was going to testify to this morning because you spelled it out. Now, proceed with your examination.

MR. LANGNES: I am not the witness, Your Honor. I may know the facts but—

THE COURT: We will find out what he knows.

MR. MAYBERRY: Just one moment, Your Honor.

THE COURT: This is not your witness, Mr. Mayberry. Keep quiet.

MR. MAYBERRY: Oh, yes, he is my witness, too. He is my witness, also. Now, we are at the penitentiary and [fol. 2280] in seclusion. We can't talk to any of our witnesses prior to putting them on the stand like the District Attorney obviously has the opportunity, and as he obviously made use of the opportunity to talk to his witnesses. Now—

THE COURT: Now, I have ruled, Mr. Mayberry.

MR. MAYBERRY: I don't care what you ruled. That is unimportant. The fact is—

THE COURT: You will remain quiet, sir, and finish the examination of this witness.

Mr. MAYBERRY: No, I won't be quiet while you try to deny me the right to a fair trial. The only way I will be quiet is if you have me gagged. Now, if you want to do that, that is up to you; but in the meantime I am going to say what I have to say. Now, we have the right to speak to our witnesses prior to putting them on the [fol. 2281] stand. This is an accepted fact of law. It is nothing new or unusual. Now, you are going to try to force us to have our witness testify to facts that he has only a hazy recollection of that happened back in 1965. Now, I believe we have the right to confer with our witness prior to putting him on the stand.

THE COURT: Are you finished?

MR. MAYBERRY: I am finished.

THE COURT: Proceed with your examination.

MR. LANGNES: I want the record to show, Your Honor—I want the record to show that I am being forced to, one, use a witness out of turn merely because of the fact he is here; two, that I refuse—that I object to the whole proceedings of this hearing—this particular stage of the proceedings—

THE COURT: I am sure you do, Mr. Langnes. Proceed with your examination.

MR. LANGNES: —and three, I object to you con-
[fol. 2282] ducting my defense.

MR. CODISPOTI: I object on the ground that I have heard from reliable sources that the prison officials have been tampering with this particular witness, and I feel that I should be given an opportunity as a co-defendant of Mr. Langnes to question this witness and to ascertain whether or not there is any substance to this rumor I have heard.

THE COURT: You will be given that opportunity.

MR. CODISPOTI: Not now, not in the presence of the entire jury, but for a mere five or ten minutes in seclusion.

THE COURT: Proceed with your examination Mr. Langnes.

BY MR. LANGNES:

Q Sir, what is your name?

A Kenneth Souders.
THE COURT: What was it?
[fol. 2283] A Kenneth Souders.
THE COURT: Keep your voice up.
MR. LANGNES: I object to the Judge badgering the witness. He is doing the best he can, Your Honor.
THE COURT: Go on.
MR. LANGNES: He doesn't need no hint.

BY MR. LANGNES:

Q Where do you reside, Kenney?
A Western State Penitentiary.
Q How old are you?
A 23.
Q Kenney, how long have you been in prison?
A Going on five years now.
Q When did you enter prison?
A April 5, 1962.
Q What are you in for?
A Homicide.
MR. LANGNES: (Indicating by throwing a pencil) Like I told you, you force this trial on me—you going to give me

[fol. 2284] (Page 2284 is blank due to misnumbering pages. Page 2283 is followed by page 2285)

JOHN H. GOODWORTH
Official Court Reporter

[fol. 2285] an illegal trial, I told you before what I was going to do to you, and I mean it. Now I refuse to go on with this trial if you are going to railroad me and badger my witnesses, force me to an unfair trial, that is exactly what I am going to do, punk. I'm going to blow your head off. You understand that?
THE COURT: Proceed with your questioning.
MR. LANGNES: You go to hell.
THE COURT: Any questions of this witness?

MR. CODISPOTI: The defendant Dominick Codispoti at this time—

THE COURT: Just a moment. You are out of order.

MR. LANGNES: You've been out of order ever since this trial started in the proceedings.

THE COURT: Any further questions of this witness, Mr. Langnes?

[fol. 2286] MR. LANGNES: Let me think about it. Give me time, Mister. I'll think about it. How's that, huh?

THE COURT: We will give you two minutes.

MR. LANGNES: I don't care what you give me. I'll give myself an hour.

THE COURT: Very well. You may proceed, Mr. Mayberry, since you want to ask questions of this witness.

Mr. LANGNES: I'm not done examining the witness, Your Honor.

THE COURT: I will give you two minutes to ask your next question.

MR. CODISPOTI: Are you going to tell me my co-defendant is not crazy? You must be crazy to try me with him. How can you guarantee me a fair trial with a nut? The man is obviously sick. Anybody can see that.

THE COURT: Now you just keep quiet. I have [fol. 2287] heard enough from you.

MR. CODISPOTI: You haven't heard nothing.

MR. LANGNES: I ask Your Honor, do I get a fair trial?

THE COURT: Proceed with your questioning.

MR. LANGNES: I'm asking, do I get a fair trial?

THE COURT: Your two minutes are up, Mr. Langnes.

MR. LANGNES: The hell with the two minutes. I got life facing me and you're worried about two minutes.

MR. MAYBERRY: I have to ask for a severance because of all this.

THE COURT: Refused.

MR. MAYBERRY: Now, what do you want me to do? Just force me to sit here and be continually being [fol. 2288] prejudiced by all this here furor and all that is going on?

THE COURT: You have had your share of it, sir.

MR. MAYBERRY: That's not the point.

THE COURT: All right. Do you have any questions, Mr. Langnes, for the last time.

MR. LANGNES: I'm saying for the last time, go to hell.

THE COURT: Proceed with your questioning, Mr. Mayberry.

MR. LANGNES: I am not done examing the witness.

THE COURT: We will preclude you from questioning the witness. Proceed with your questioning.

MR. MAYBERRY: I will as soon as you get done talking to Mr. Langnes.

MR. LANGNES: Is it on the record that you refused me to examine my witness?

[fol. 2289] THE COURT: Everything is on the record.

BY MR. MAYBERRY:

Q Now, Mr. Souders, I want to advise you that you have a constitutional right to refuse to testify in this case, and if you would rather not, if you would care to take that right—

A I would like to take that right.

Q All right.

MR. MAYBERRY: The witness is excused as far as defendant Mayberry is concerned.

THE COURT: Do you have any questions, Mr. Codispoti?

MR. CODISPOTI: I have a statement to make in regards to this.

THE COURT: No, no statements. Do you have any questions of this witness?

MR. CODISPOTI: No, I do not intend to question the witness because he has been harassed by the prison officials.

THE COURT: You may be excused, sir.

* * * *

[fol. 2301] HERBERT F. LANGNES, a witness called in behalf of the defense, having been duly sworn previously, resumed the stand and testified as follows:

DIRECT EXAMINATION

* * * *

[fol. 2304] BY MR. MAYBERRY:

Q Now, did you notice any guards present in the area at this time?

A There were guards there. I mean, they were in the yard.

Q Do you recall their names?

[fol. 2305] MR. MEDONIS: If the Court please, I might object at this time unless we know what specific time.

MR. MAYBERRY: I said approximately 2:00 o'clock in the afternoon, I believe.

THE COURT: Between 2:00 and 2:30. I take it that you are talking about the same time period.

MR. MEDONIS: The conversation between the inmates would be material, but I don't think it is material who the guards were.

THE COURT: He car state if there were any guards, but don't go into it too far, into that inquiry at this time.

BY MR. MAYBERRY:

Q Do you know who the guards were in the yard?

A No; by sight, not by name.

Q Mr. Langnes, after this do you know how the conversation terminated?

A All I know is there seemed to be some sort of an agreement.

THE COURT: No.

[fol. 2306] MR. MEDONIS: I object to that and I ask it be stricken.

THE COURT: The question is, do you know how the conversation terminated. I don't know what you mean by that, but we will let him answer that if he knows.

(Exception noted.)

MR. MAYBERRY: By that I mean—
THE COURT: No, no. You ask the question.
A What did you mean?

BY MR. MAYBERRY:

Q I meant—
MR. MEDONIS: Wait a minute.

BY MR. MAYBERRY:

Q —how did the conversation end? In other words—
THE COURT: No, no. Don't lead the witness.
A Well, all that I observed was that they just departed. I don't think there was any—just a few words, but then departed.

[fol. 2307] BY MR. MAYBERRY:

Q Now, concerning this tunnel that you mentioned, you mentioned overhearing these persons talk about, do you recall who first spoke about this tunnel?
A Rizzo.
Q Now, Mr. Langnes, after this conversation was over when was the next time that you seen me, Richard Mayberry that day?
A Evening meal.
Q Did you notice anything unusual at that time?
A I could see you were sort of tense.
Q What time of day was that?
A Between 4:30 and 5:00 o'clock.
Q Did you notice any of the other parties named previously or—
THE COURT: Which parties?
MR. MAYBERRY: The parties we were speaking of a few minutes ago.

BY MR. MAYBERRY:

Q Did you notice if they were present at the time?
A There in the mess hall, yes. I saw them in the mess hall.
Q Did you notice if they were in my company at the time?

MR. MEDONIS: If the Court please, I object to this. I think the question might be phrased who was with Mr. [fol. 2308] Mayberry when Langnes saw him.

THE COURT: It is leading.

(Exception noted.)

BY MR. MAYBERRY:

Q Who was in my presence at the time you seen me, Mr. Langnes?

A I think—

Q No. If you know.

A I don't know. I mean, I am not sure enough to testify to it.

Q Well, I only want to know if you know.

A No.

Q When was the next time you seen me after that on June 27th?

A In the exercise yard.

Q What time of day was that? Do you recall?

A Between 5:30 to 6:00 or maybe 5:00 o'clock to 6:00.

Q Do you recall what that was—whether it was Eastern standard time or daylight saving?

A It was Eastern standard time, but by prison time it would be daylight saving time.

THE COURT: Now, wait. I don't understand.

A We got a different time in the prison.

THE COURT: I understand that, but are you talking about 5:00 o'clock as being daylight saving time? [fol. 2309] A No, 5:00 o'clock, if I am not mistaken, would be Eastern standard time.

THE COURT: When did you have supper? Did you have supper on daylight saving time?

A Yes.

THE COURT: Was it right after supper that you saw Mr. Mayberry in the exercise yard?

A Yes, sir.

THE COURT: Wouldn't that be daylight saving time?

A Yes. All right. Daylight saving time.

THE COURT: All right. That is important.

BY MR. MAYBERRY:

Q When was the last time you seen Richard Mayberry in the yard that night? Approximately what time was it? Do you recall?

A Around 6:00 o'clock.

Q Was that daylight saving time 6:00 o'clock, or Eastern standard?

A That would have been Eastern standard. It was 7:00 o'clock daylight saving time the last time I saw you.

Q Now, Mr. Langnes, directing your attention to this time that you observed me in the exercise yard after [fol. 2310] supper that night, where did that take place at? Where did you see me out there?

A On the handball court.

Q And what was I doing at that time?

A You were watching me and Dominick play handball.

Q Did you notice how I was dressed at the time?

A Yes.

Q How was that? How was I dressed?

A You had on general prison uniform, brown shirt, T-shirt, brown trousers. You weren't wearing a cap.

Q Did you notice if I was wearing a jacket?

A No, you weren't wearing a jacket.

Q Did you notice if I had in my possession a heavy brown overcoat?

A You didn't, no.

Q Did you notice if I was carrying anything in my hands at the time?

A You didn't. I didn't see anything in your hand.

Q Did you ever see me carrying any large or bulky packages that night?

A No.

Q Did you ever see me carrying any pieces of pipe in the yard that night?

A No.

[fol. 2311] Q Or a rope?

A No.

Q Now, at the time you seen me on the handball court what time was that, approximately? Do you remember?

A You mean—6:30, 7:00 o'clock daylight saving time.

Q Do you recall
A Myself, Domi who else was present at that time?
di, and some few ick Codispoti, Rockwell, Alfred Nar-
Q Do you recall ondescript inmates.
court first between Mr. Langnes, who left the handball
A I believe I d he two of us?
Q Do you recall
where else that nig seeing me in the exercise yard any-
A Prior to seei it?
you walking up an
Q After you see you in the handball court I seen
you seen me until down the area.
A Yes. me on the handball court—you said
Q Was I on the :00 o'clock that night?
A At 7:00 o'clo
Q All right, M handball court the whole time or not?
gun tower on the k I believe you were, yes.
A I did. Langnes. Do you recall seeing a
[fol. 2312] Q Di all above the handball court?
that night?
A I did. you notice what guard was on duty
Q Who was tha
A Passoth.
Q Did you not?
passed between M
handball court? e whether or not any conversation
A Passoth— Passoth and any prisoners on the
THE COURT:
if there was any
there and heard it Wait a minute. First let's ascertain
A I don't reme nversation, and secondly, if he was
BY MR. M
ber.
Q Mr. Langnes BERRY:
on the part of Of
A Yes. did you notice any unusual conduct
MR. MEDONIS er Passoth that night?
he might be asked
THE COURT: Objection. Wait a minute. I think
what he observed.
Yes. I know, but—

BY MR. MAYBERRY:

Q All right. What if anything did you observe Mr. Passoth doing that night?
[fol. 2313] A Passoth was pacing up and down the wall.
Q Is that all?
A Looking down at the court with an unusual intenseness.
Q What do you mean by that?
A As if expecting something.
MR. MEDONIS: Wait a minute.
THE COURT: Now, wait a minute.

BY MR. MAYBERRY:

Q What led you—
MR. MEDONIS: If the Court please, I object to the comment about the nature of the look. I ask it be stricken.
THE COURT: Yes. He can testify as to what he observed. Let that portion of the testimony stand that he saw Guard Passoth pacing back and forth.

(Exception noted.)

BY MR. MAYBERRY:

Q What prompts you to say he was looking with unusual intenseness? How can you—can you mention any specific conduct on his part, or any—
MR. MEDONIS: Well, I object to the form of the [fol. 2314] question.
THE COURT: Sustained.

(Exception noted.)

BY MR. MAYBERRY:

Q —or any other conduct on the part of Officer Passoth other than pacing up and down the wall?
A I did.
Q What was that?
A You was extremely tense.
MR. MEDONIS: Objection.

BY MR. MAYBERRY:

Q No. Don't state a conclusion because Gilbert is going to object and Sullivan will sustain. Give me facts. What leads you to say that?

A I can't give you facts. I can just state what I observed, what I actually saw him doing, but I mean, it wouldn't be stating as facts.

* * * *

[fol. 2401] BY MR. MAYBERRY:

Q Now, do you know, Mr. Langnes, whether or not this Butch Rizzo was an agent for the prison authorities on June 27th? Do you know of your own knowledge?

A Yes, he is.

MR. MEDONIS: Objection.

THE COURT: Wait a minute. The question is do [fol. 2402] you know of your own knowledge.

A Yes.

THE COURT: How do you know?

A He entrapped me and framed me.

THE COURT: We have overruled that. What else do you know?

BY MR. MAYBERRY:

Q What specific facts?

A I am on trial today.

Q What specific facts do you know that would show his acting as an agent for the prison authorities?

A He told me to go to the underground tunnel that didn't exist.

MR. MEDONIS: Wait a minute.

THE COURT: We are not going to permit that to go on again.

BY MR. MAYBERRY:

Q What specific fact—

THE COURT: Is that all you have?

MR. MAYBERRY: Will you let me conduct my defense?

A He bragged about it.

THE COURT: Is that the basis of your informa-
[fol. 2403] tion?
MR. MAYBERRY: I wish you would permit me to conduct my own defense, Your Honor.
THE COURT: Keep quiet, Mr. Mayberry. Is that the basis of your information?
A Let me think a minute.

BY MR. MAYBERRY:

Q Do you have—
THE COURT: Just a moment.

BY MR. MAYBERRY:

Q —concrete facts that this person—
THE COURT: Just a moment, Mr. Mayberry.

BY MR. MAYBERRY:

Q Do you understand the question, Mr. Langnes?
THE COURT: Keep quiet, Mr. Mayberry.
MR. MAYBERRY: My witness isn't being in an inquisition, you know. This isn't the Spanish Inquisition.
THE COURT: Do you have any other basis upon which you can express an opinion?
[fol. 2404] A He bragged about it to me.
THE COURT: Is that the basis on which you are going to make a statement, his bragging to you?
A I am on trial today. What more proof do we need?
THE COURT: We sustain the objection and prohibit any questions along those lines.

(Exception noted.)

BY MR. MAYBERRY:

Q Now, do you know of any particular facts that you can relate that would indicate that this party was acting on direct orders from the prison authorities?
MR. MEDONIS: Objection.
THE COURT: Sustained.

(Exception noted.)

THE COURT: We have just ruled on that, Mr. Mayberry.

BY MR. MAYBERRY:

Q Did you understand what His Honor was saying to you, Mr. Langnes, when he was questioning you a minute ago?

MR. MEDONIS: Wait a minute. If the Court please, [fol. 2405] we—

THE COURT: We are not going to go into that.

MR. MEDONIS: I think Mr. Mayberry has exhausted his questions within the limits of the offer.

MR. MAYBERRY: No.

BY MR. MAYBERRY:

Q For the record, do you understand what His Honor was saying to you a minute ago about this?

A Yes.

Q You did understand?

A Yes.

Q Did you ever hear this Butch Rizzo say that he was an agent for the prison authorities, Mr. Langnes?

MR. MEDONIS: Objection.

THE COURT: We have covered that. You are putting the same type of question in a different form, Mr. Mayberry. Now, you refuse to abide by the rulings of this Court—

[fol. 2406] MR. MAYBERRY: I am trying to ask the questions, Your Honor.

THE COURT: We are not going to permit you to ask such questions that have been ruled on before. It is hard for you to understand that, but we will insist that you abide by the rules.

BY MR. MAYBERRY:

Q Now, Mr. Langnes, do you know where this Butch Rizzo is today?

A Somewheres here in Pittsburgh.

Q Do you know when he got out of prison, if he is out of prison?

A Around 1966.
Q In the early part of latter part or what?
A Early part.
Q Now, do you know what the motive was? Do you know if there was any motive for the prison authorities seeking to entrap Richard Mayberry?
A Yes.
MR. MEDONIS: Objection.
THE COURT: Sustained, and the answer will be stricken.

(Exception noted.)

[fol. 2407] BY MR. MAYBERRY:

Q Did you ever see or do you know of your own knowledge whether or not this Butch Rizzo was ever paid off by the prison authorities for his work as an agent?
MR. MEDONIS: Objection.
THE COURT: Sustained.

(Exception noted.)

BY MR. MAYBERRY:

Q Did you ever see him being paid by the prison officials?
MR. MEDONIS: Objection.
THE COURT: Sustained.

(Exception noted.)

BY MR. MAYBERRY:

Q Well, did you ever see him getting any special treatment by the prison authorities?
MR. MEDONIS: Objection.
THE COURT: Sustained.

(Exception noted.)

BY MR. MAYBERRY:

Q Do you know whether or not any relationship ex-
[fol. 2408] isted between this Butch Rizzo and the prison authorities?
A Yes.

MR. MEDONIS: Objection.
THE COURT: Sustained.

(Exception noted.)

BY MR. MAYBERRY:

Q On June 27th?
A Yes.
MR. MEDONIS: Objection.
THE COURT: Sustained.

(Exception noted.)

BY MR. MAYBERRY:

Q 1965?
A Yes.
MR. MEDONIS: This is obviously improper and—
THE COURT: Yes, they are improper. If that is all the questions that Mr. Mayberry has of the witness we will excuse this witness. You are either going to ask [fol. 2409] proper questions, and I told you along what lines we will permit further examination of this witness, or we are going to call it quits with this witness.
MR. MAYBERRY: Now, just what do you call proper? I have asked questions, numerous questions and everyone you said is improper. I have asked questions that my adviser has given me, and I have repeated these questions verbatim as they came out of my adviser's mouth, and you said they are improper. Now just what do you consider proper?
THE COURT: I am not here to educate you, Mr. Mayberry.
MR. MAYBERRY: No. I know you are not. But you're not here to railroad me into no life bit, either.
MR. CODISPOTI: To protect the record—
THE COURT: Do you have any other questions to ask this witness?
[fol. 2410] MR. MAYBERRY: You need to have some kind of psychiatric treatment, I think. You're some kind of a nut. I know you're trying to do a good job for that Warden Maroney back there, but let's keep it looking

decent anyway, you know. Don't make it so obvious, Your Honor.

THE COURT: Do you have any further questions to ask this witness?

MR. MAYBERRY: Yes, sir, on entrapment.

THE COURT: On entrapment?

MR. MAYBERRY: Yes, I do.

THE COURT: Now let's hear them.

* * * *

[fol. 2498] MR. LANGNES: I want to address the Court. I want to disqualify Your Honor and state the following reasons, and other things, too, also.

THE COURT: You are out of order.

MR. LANGNES: I figured that.

THE COURT: You are out of order, and you can raise—

MR. LANGNES: This is concerning the newspaper articles. They're blaming us for costing the taxpayers money. It is you and Maroney and the State.

THE COURT: You are out of order, Mr. Langnes. I want you to keep quiet.

MR. LANGNES: We asked for a mistrial and you insisted to this going on.

THE COURT: I said keep quiet.

MR. LANGNES: I have—

[fol. 2499] THE COURT: Take this prisoner out of the courtroom.

MR. LANGNES: Go to hell.

(Thereupon Mr. Langnes was removed from the courtroom.)

THE COURT: Go ahead with your case, Mr. Mayberry.

DOMINICK JOHN CODISPOTI, resumed the stand and testified further as follows:

DIRECT EXAMINATION (Cont'd)

BY MR. MAYBERRY:

MR. MAYBERRY: Before we proceed on this I have to make a motion for the withdrawal of a juror.

THE COURT: Now proceed with your questioning, Mr. Mayberry.

MR. MAYBERRY: Because of the outburst of my co-defendant and the prejudicial effect it has caused, and [fol. 2500] also since my co-defendant has mentioned this article in yesterday's Pittsburgh Press about the money being expended in this case.

THE COURT: I want you to proceed with your questioning, Mr. Mayberry.

MR. MAYBERRY: I have a motion.

THE COURT: You will make the motion after you are through with this witness. Proceed with your questioning.

MR. MAYBERRY: I have a motion.

THE COURT: We will hear your motion later.

MR. MAYBERRY: I have a motion that is a timely motion, Your Honor. I feel it has to be made in time.

THE COURT: We will hear your motion after you are through with this witness, Mr. Mayberry. Now, go ahead.

MR. MAYBERRY: I have a motion that must be made on the record at the proper time, Your Honor, [fol. 2501] and I feel this is the proper time to make the motion. Under Maxwell vs. Shephard—no, Shephard vs. Maxwell, Supreme Court of the United States, has said that due to publicity, bad publicity by the newspaper such as they are doing in this case it has been established it is grounds for a mistrial. We certainly haven't asked the newspapers to print all this prejudicial matter about our past records, and the charges we are waiting to try, and $40,000 of taxpayers' money.

THE COURT: You are out of order now. Proceed with the questioning. Proceed with the questioning of this witness. If you have anything, any motions, later on you may place them on the record. I have stated that three times. Now, proceed with your questioning.

MR. MAYBERRY: Could I have—

THE COURT: We will give you the opportunity to place whatever you want on the record. Proceed with [fol. 2502] your questioning.

MR. MAYBERRY: All right. Now, could I have a ruling, Your Honor, before we proceed on that?

THE COURT: I am not going to rule until you are through with this witness. I have stopped you from placing the matters on the record that are not germane at this time. Proceed with the questioning of your witness.

MR. MAYBERRY: As I am acting as my own counsel I feel it ought to be allowed—I feel I ought to be allowed to make a motion like any other attorney representing a client.

THE COURT: I will state to you once again, Mr. Mayberry, this is not the time to do it. Now proceed with the questioning of your witness.

BY MR. MAYBERRY:

Q All right, Mr. Codispoti, you have stated that at [fol. 2503] the time you observed Mr. Walz and Mr. Ferrara at the chart desk that they were not tied up. Did you notice whether they were restrained in any way of their freedom of movement?

A No, they wasn't restrained in any manner.

Q Well, did you notice any other prisoners in the vicinity, in the immediate vicinity of Officer Walz and Ferrara at that time?

A Yes, I did.

Q What time was this that you made this observation? Do you recall?

A A little after 7:00 o'clock daylight saving time.

(Thereupon Mr. Langnes was escorted back into the courtroom.)

MR. LANGNES: I still refuse to shut up.
MR. MAYBERRY: Now, what I was saying—
THE COURT: You keep quiet, Mr. Langnes. Proceed with your questioning.
MR. LANGNES: What I was saying—
THE COURT: Keep quiet.
MR. LANGNES: —about the newspapers and—
[fol. 2504] THE COURT: Keep quiet. We will hear you at a later time, at the lunch hour.
MR. LANGNES: I am saying it now while the people are here and know what's coming off.
THE COURT: Do we have a gag here?
MR. LANGNES: You'll have to gag me.
THE COURT: Do we have a gag here?

(Off record discussion.)

MR. MAYBERRY: I have to ask for a severance.
THE COURT: I have heard that before. It is denied again. Let's go on.

(Exception noted.)

MR. MAYBERRY: This is the craziest trial I have ever seen.

* * * *

[fol. 2582] THE COURT: You may call your next witness, Mr. Mayberry.
MR. MAYBERRY: Just a minute. The next witness is Gerald Rittle. He is one of the witnesses named in the notice of alibi defense that I filed with the office of the district attorney on October 12 of this year. I filed this man's name as an alibi witness on the notice of—
THE COURT: Call your next witness.
MR. MAYBERRY: Gerald Rittle.
THE COURT: Call your next witness, Mr. Mayberry.
MR. MAYBERRY: I just did.
THE COURT: He was not subpoenaed.
[fol. 2583] MR. MAYBERRY: Am I being denied Gerald Rittle as an alibi witness?
THE COURT: You know the order, Mr. Mayberry, call your next witness.

MR. MAYBERRY: Have I been denied Gerald Rittle as a witness?

THE COURT: You have an order as to that.

MR. MAYBERRY: I never received an order as to Gerald Rittle. I filed an alibi defense and named Gerald Rittle as an alibi witness on October 12 at least a month prior to the beginning of this trial, and I did make this notice of alibi defense under Rule 312 of the Pennsylvania Rules of Criminal Procedure.

THE COURT: Call your next witness that has been subpoenaed in your behalf.

MR. MAYBERRY: Do I understand that I am being denied Gerald Rittle as a defense witness?

[fol. 2584] THE COURT: You may not call Mr. Rittle. I have said that to you a number of times. Now proceed with the witnesses that have been subpoenaed.

MR. MAYBERRY: Then I am denied compulsory process for obtaining this witness? Is that correct?

THE COURT: I stated all I am going to say on that. Proceed with your next witness.

MR. MAYBERRY: My next witness is Lloyd Moore. He is also an alibi witness and one—

THE COURT: He has not been subpoenaed. Call your next witness.

MR. MAYBERRY: Am I being denied Lloyd Moore?

THE COURT: Call your next witness who has been subpoenaed, Mr. Mayberry.

MR. MAYBERRY: I am asking for a ruling from [fol. 2585] Your Honor.

THE COURT: You have had an order of this Court, Mr. Mayberry, earlier as to the number of witnesses and by name who have been subpoenaed to testify in your behalf. Now call those.

MR. MAYBERRY: May I make a show of proof on this witness here what I intend to prove?

THE COURT: No, you may not, sir. You have already done that on two different occasions.

MR. MAYBERRY: In that case is it my understanding that Your Honor has denied me both Gerald Rittle and Lloyd Moore as defense witnesses, is that correct?

THE COURT: They have not been subpoenaed by the Court, that is correct.

MR. MAYBERRY: But I have asked that they be [fol. 2586] subpoenaed as alibi witnesses as far back as October 12 of this year.

THE COURT: All right. Call the witnesses who have been subpoenaed.

MR. MAYBERRY: Now the next witness is Raymond Wilson, also an alibi witness.

THE COURT: Mr. Mayberry, I am not going to permit you to go on. You have already filed a show of proof. That was filed as a matter of record. You have an order of Court relating to the calling of certain witnesses in this case.

MR. MAYBERRY: You have never ruled on these particular people I have named. You have not subpoenaed them, but you never ruled on whether or not I could have them as witnesses, either. Now, Lloyd Moore and Gerald Rittle and Raymond Wilson are all alibi witnesses named in the notice of alibi defense that I filed on October 12 with the district attorney's office and with the court.

[fol. 2587] THE COURT: Very well. Put on the record that Raymond Wilson has been included in this list of witnesses and he was not subpoenaed. Now proceed.

MR. MAYBERRY: And how about Gerald Rittle and Lloyd Moore?

THE COURT: The same thing.

MR. MAYBERRY: Let the record also note that I filed a notice of alibi defense and named these witnesses in that notice of alibi defense.

THE COURT: I don't know what the record shows, but you go ahead.

MR. MAYBERRY: At this time I ask to submit as evidence a copy of the notice of alibi defense that I filed on October 12, 1966 in which I asked for these particular witnesses to be subpoenaed as alibi witnesses.

THE COURT: You have that. That is already filed [fol. 2588] of record of all witnesses you asked to be subpoenaed in this case, and the Court has taken action on that. Now proceed with the witnesses that you already have.

MR. MAYBERRY: May I submit this notice of alibi defense as evidence, Your Honor?

THE COURT: No, you may not, sir. Now go ahead.

MR. MAYBERRY: Well, I would like to read it into the record. It is very brief, a letter concerning the notice of defense of alibi defense. May I read it.

THE COURT: No, you may not. Proceed with the calling of your next witness.

MR. MAYBERRY: Well now, I think I ought to be permitted to read—

THE COURT: I directed you not to read it, Mr. Mayberry, and I asked you to call your next witness, [fol. 2589] and you have an exception to the ruling of the Court. Now go on.

MR. MAYBERRY: My next witness is John Winkler.

THE COURT: He will not be called.

MR. MAYBERRY: He is a prisoner at the penitentiary.

THE COURT: He will not be called.

MR. MAYBERRY: My next witness after him is George Welch, another prisoner at the penitentiary at Pittsburgh.

THE COURT: Let the record show that the following witnesses have been subpoenaed by this court and they are the only witnesses that you will be permitted to call at this time. You have the witness Madronal, Montgomery, Mr. Maroney, Guard Wilbik. Let's limit it to that and let the record show that all the witnesses have not been called and have been turned down by the Court.

[fol. 2590] MR. MAYBERRY: Does that also apply to prisoner George Deputy, prisoner at the penitentiary?

THE COURT: You don't hear too well, Mr. Mayberry.

MR. MAYBERRY: And you—

THE COURT: Just a moment. You have filed a list of all the witnesses whom you wanted in this case. It is a matter of record.

MR. MAYBERRY: I would like it to be noted on the trial record—

THE COURT: It is noted on the record. Every paper you have filed is a part of the trial record.

MR. MAYBERRY: I would like to have a ruling on each witness I asked for.

THE COURT: No, I don't propose to rule again. Now go on and call the witnesses that have been properly subpoenaed.

[fol. 2591] MR. MAYBERRY: Well, my next witness is George Deputy, who I call next.

THE COURT: Refused.

MR. MAYBERRY: And after that I ask for Edward C. Robinson, a prisoner at the penitentiary be called as a witness.

THE COURT: Mr. Mayberry, of all the innumerable contempts you have committed, you are committing a contempt of court. I have told you that you have certain witnesses that have been subpoenaed that may be called.

MR. MAYBERRY: All I am asking the Court is to rule.

THE COURT: There will be no more name calling.

MR. MAYBERRY: Is it the same ruling?

THE COURT: No, sir. I am not going to keep ruling on that. I want you to understand that, Mr. Mayberry. [fol. 2592] Now call the witnesses whom the Court indicated that are available to you.

MR. MAYBERRY: Before I get to that I wish to have a ruling, and I don't care if it is contempt or whatever you want to call it, but I want a ruling for the record that I am being denied these witnesses that I asked for months before this trial ever began.

THE COURT: Once again let the record show that the defendant Mayberry together with all of the other defendants have submitted a list of witnesses with a show of proof. The Court has passed upon all of these witnesses and the reason stated in the show of proof as a result of which certain witnesses were subpoenaed to appear in this court. The Court therefore is limiting the defendants to the production of those witnesses who have been subpoenaed to appear in this case.

* * * *

[fol. 2608] THE COURT: All right. In connection with the offer that you have made, this witness will not be asked any questions relating to this so-called self-defense that you have; this witness will not be permitted to be asked any questions as to the illegality of imprison-[fol. 2609] ment on June 27, 1965 and that you were not confined in accordance with the law; this witness may not be asked any questions regarding the so-called illegality of confinement that therefore you were illegally restrained of your liberty; this witness will not be asked any questions relating to any orders that he may have given to fire tear gas bombs into the ward; furthermore, this witness will not be questioned as to any orders that he may or may not have given relative to firing bullets into the hospital; he will not be asked any questions relating to any matters following the arrest as to your allegations of not being able to receive letters, or visits, or to make any contacts.

You will not be permitted to ask any questions of this wtiness relating to a so-called underground dungeon; you will not be permitted to ask any questions as to de-[fol. 2610] nial of access to any of the courts or to any legal redress.

You will not be permitted to ask this witness any questions relating to your cell block and the job that you had. You will not be permitted to ask this witness relating to the selling job that you had to prove you had nothing to do with this escape.

These are matters that you will not be permitted to make inquiries into.

MR. MAYBERRY: Yeah? Why? What are you scared that certain fact might be brought out?

THE COURT: I have made a ruling, Mr. Mayberry, limiting—

MR. MAYBERRY: I know what the hell you done, you creep. What do you do? Eat at the same club as him every night? Scared that certain facts might be brought out?

[fol. 2611] THE COURT: These are the limits in which you will not interrogate this witness, and I will tell you ahead now that we will stop you, if you do.

MR. MAYBERRY: You don't want certain things brought out.

THE COURT: That's enough, Mr. Mayberry.

MR. MAYBERRY: Ah, nothing is enough. It's enough when I feel like saying it's enough.

THE COURT: It's enough when I say it's enough, and you will adhere to the rulings—

MR. MAYBERRY: I will like hell. I will like hell.

• • • •

[fol. 2614] THE COURT: Let the record show that you have been performing a three ring circus very well, and let the record show further, so there is no mistake about it, that the Court does not intend to let you get away with it.

• • • •

[fol. 2681] BY MR. MAYBERRY:

Q Do you know of your own knowledge whether or [fol. 2682] not prisoners at the penitentiary were permitted to have tools in their cells as of June 27, 1965?

MR. MEDONIS: Objection.

THE COURT: Sustained.

(Exception noted.)

MR. MAYBERRY: Now, Your Honor, you asked me what I intended to prove. I refer you to point number 7 that I was going to prove the impossibility of securing these weapons and other exhibits presented by the Commonwealth.

THE COURT: Yes, you already intrerogated the witness on that, and you got answers.

MR. MAYBERRY: I have not asked him anything about what a prisoner is allowed to have over in his cell at the penitentiary concerning chemicals and tools.

THE COURT: All right. We have ruled on those questions already. Do you have anything else, Mr. May- [fol. 2683] berry? I think you have exhausted the matters that you intended to prove by this witness.

MR. MAYBERRY: Point number 7, Your Honor. I haven't asked the witness about the availability of tools to prisoners in their cells.

THE COURT: That was not your offer. You asked about the exhibits. Now go on.

MR. MAYBERRY: I said in point number 7 that I intended to prove by the witness the impossibility—

THE COURT: I have ruled on that, Mr. Mayberry. Now proceed with your questioning, and don't argue.

MR. MAYBERRY: You're arguing. I'm not arguing, not arguing with fools.

* * * *

[fol. 2790] THE COURT: I am sure the jury has noted these contemptuous outbursts, * * *

* * * *

[fol. 2939] THE COURT: You may question Mr. Madronal, Mr. Codispoti.

MR. MAYBERRY: I haven't finished yet.

THE COURT: Yes, you have.

MR. MAYBERRY: I haven't finished yet with my witness. You do this everyday. You cut me off before I fully develop my defense.

THE COURT: We are not going to permit you to ask this witness any questions based upon what he knows about Officer Ferrara back in 1962. I have ruled on that at least a half dozen times.

MR. MAYBERRY: Even though this witness knows facts that indicate a hatred existing between Officer Ferrara and me as far back as then?

THE COURT: We have sustained the objections. Now, if you have nothing else you are through with this witness.

[fol. 2940] MR. MAYBERRY: No, I am not through.

THE COURT: Ask one more question then and you will be through. Go ahead.

BY MR. MAYBERRY:

Q Mr. Madronal, do you know of your own knowledge whether or not at the time of this trial, November, 1966, whether or not any hatred existed between Guard Ferrara and Richard Mayberry?

MR. MEDONIS: Objection.

THE COURT: Sustained.

(Exception noted.)

THE COURT: Now you are through, Mr. Mayberry.

MR. MAYBERRY: No, because—

THE COURT: Yes, you are. Proceed with your questioning, Mr. Codispoti.

MR. MAYBERRY: No, I am not finished with my witness.

THE COURT: Yes, you are, sir.

MR. MAYBERRY: No, I am not, sir.

[fol. 2941] THE COURT: We say you are, sir, and you keep quiet. Now proceed, Mr. Codispoti.

BY MR. MAYBERRY:

Q Mr. Madronal, have you—

THE COURT: All right, we will do the same thing as yesterday. Remove Mr. Mayberry from the courtroom. You are asking for it, and we will do it.

MR. MAYBERRY: Let the record note that I am not present at a critical stage of the proceedings.

THE COURT: We will let the record note that. Proceed, Mr. Codispoti.

(Thereupon Mr. Mayberry was removed from the courtroom.)

* * * *

[fol. 2948] MR. MAYBERRY: Before we begin I would like to make an objection to the night session as placing an unwarranted burden on defendant Mayberry and interfering with his right to a fair trial, that defendant Mayberry must prepare all his motions and papers concerning this trial over at the cell in the penitentiary at night, and he must print these by hand without the benefit of any help from a typewriter or Mimeograph machine or anything, and he never gets back to the penitentiary anyway until around 6:00 o'clock at [fol. 2949] night, and by the time he gets done preparing the papers for the next day's court day it is 10:30, quarter to 11:00 at night. As it is now I have no way of preparing my motions for tomorrow's session due to this night session that we are now into.

THE COURT: You may proceed, Mr. Codispoti.

MR. MAYBERRY: And for that reason I would ask that the night session be terminated now.

THE COURT: You may proceed, Mr. Codispoti.

MR. MAYBERRY: Is my motion ruled upon?

THE COURT: Yes, it is obviously denied. Go on.

MR. MAYBERRY: I ask to finish my direct examination of the witness Madronal.

THE COURT: You are through, Mr. Mayberry.

MR. MAYBERRY: I haven't finished.

[fol. 2950] THE COURT: You are through. I said you are through. Keep quiet. Let's go ahead, Mr. Codispoti.

MR. MAYBERRY: I am not through questioning my witness for the defense which you said—

THE COURT: Mr. Mayberry, you will either keep quiet or the Court will be compelled to eject you from the courtroom during this session.

MR. MAYBERRY: I cannot remain silent while I have yet failed to finish.

THE COURT: You will remain silent outside. Remove Mr. Mayberry.

MR. MAYBERRY: I object to being removed from my trial.

(Thereupon Mr. Mayberry was removed from the courtroom.)

* * * *

[fol. 3017] MR. HARPER: Before we resume I would like to address the Court. Before recess I think I made some remarks to the Court that were perhaps out of order. Well, I want to say this, Your Honor, perhaps my patience is drawing a little short and my nerves are on edge and I perhaps said things that I should not have said. Since I have been a member of the bar I have always tried to conduct myself in a complimentary manner befitting my profession. If I offended the Court in front of the ladies and gentlemen of the jury I am very sorry and ask the Court to accept my apology.

THE COURT: We thank you for the statements, Mr. Harper, and we will just forget about this.

MR. HARPER: Thank you, Your Honor.

[fol. 3018] MANUEL MADRONAL, resumed the stand and testified further as follows:

THE COURT: Mr. Codisopti, do you have any further questions of Mr. Madronal?

MR. MAYBERRY: Before defendant Codispoti I want to put upon the record that I have never finished my case under the due process guaranteed by the Fourteenth Amendment and equal protection of the law to the Federal Constitution and the Sixth Amendment to the Federal Constitution, and I ask and demand my right to a fair trial and to finish my examination of the witness Madronal so that I may present my defense of not guilty by reason of entrapment, and so that I may impeach the credibility of the Commonwealth witnesses, so that I might establish my innocence through this witness as I have indicated in the show of proof that I presented to Your Honor, and I also ask for this right to [fol. 3019] finish my direct examination because I have never yet been given an adequate opportunity to complete my examination of the witness, and for that reason I will not sit quietly by while you refuse me the right to present my defense, and for that reason I again request permission to resume and complete my direct examination of the witness Madronal for the same reasons that you had this man brought up from Craterford Peniteniary, all the way at the expense of the taxpayers, and for that reason also I ask to complete my direct examination of the witness, and I cannot and will not abide by any adverse ruling to this motion for the same reason that I have stated earlier, and because I feel that I have a right as an American citizen under the constitution and the laws of the United States and the laws of Pennsylvania, both in the statute books and the common law [fol. 3020] right to a fair trial, and for that reason also I ask to be allowed to finish my direct examination.

THE COURT: That's enough.

MR. MAYBERRY: And because of this—

THE COURT: That's enough. Keep quiet.

MR. MAYBERRY: I will not abide by the rulings of the Court, and for that reason I ask to finish my di-

rect examination, and I hope you will permit me to complete my direct examination.

THE COURT: Will you stop to take a breath, Mr. Mayberry?

MR. MAYBERRY: If not, I am sorry, Your Honor, but I will have to continually interject—

THE COURT: Very well. Remove this defendant. I was going to state that you are to be here for the cross-examination of this witness, but apparently you [fol. 3021] will not stop.

MR. MAYBERRY: I cannot stop.

THE COURT: And you are forcing me to again eject you from this courtroom, which I am now doing. Remove this prisoner.

(Thereupon Mr. Mayberry was removed from the courtroom at 9:30 p.m.)

* * * *

[fol. 3031]

Thursday, December 8, 1966
Pittsburgh, Pennsylvania

MR. MAYBERRY: Your Honor, I have a motion to make.

THE COURT: Wait a minute. I would like you to reserve your motion until after the noon recess.

MR. MAYBERRY: No, before we begin—

THE COURT: Please.

MR. MAYBERRY: For the sake of time I have—

THE COURT: You will be given an opportunity to be heard. I am asking you to reserve it until the noon recess.

MR. MAYBERRY: For the sake of time in this these motions must be made at this point.

THE COURT: I will hear them after recess, Mr. [fol. 3032] Mayberry. Now let's go on.

MR. MAYBERRY: For the sake of time in this the motion must be made now because otherwise the motion will be made out of time.

THE COURT: Is this the same motion that you made last night?

MR. LANGNES: I am referring to—

THE COURT: I am not talking to you.

MR. MAYBERRY: We each have a motion.

THE COURT: Is this the same motion you made last night?

MR. MAYBERRY: No.

THE COURT: Then, of course, there is nothing before the Court until the noon recess.

MR. MAYBERRY: Yes, there is. The Court has no knowledge of what the motion is, for one thing.

[fol. 3033] MR. LIVINGSTON: If Your Honor please, at this time on behalf of defendant Langnes I have a motion to make. I think it is timely at this time, and should be made at this time.

THE COURT: All right, I will hear all motions at this time.

MR. LIVINGSTON: On behalf of defendant Langnes I now move for the withdrawal of a juror, or in the alternate, for a severance, or in the alternative at least for an interrogation of the jury to determine what if any impact might be had on the basis of an official communique by the district attorney of Allegheny County. I was shocked. It would be a gross understatement to say shocked by the conduct of the district attorney in writing a letter in the midst of this trial to the Pittsburgh Press and in that letter referring to matters which would be clearly prejudicial if brought out in the course [fol. 3034] of this trial by his assistant by referring to detainers against defendant Langnes in other jurisdictions, by referring to the sentence imposed upon the defendant Langnes, in making an attempt to justify his conduct in the prosecution of this trail. I submit that this official conduct on behalf of the district attorney taken in consideration with the whole picture in this case, including the flash bulbs popping in the eyes of the defendants as they walked in the door of the courtroom, the treatment continually by the various elements of the news media is tantamount to conduct that would make Heinrich Heimmler blush with shame. I submit on the

basis of this conduct of the district attorney and the basis of the news media, and on the basis of what I talked about before with reference to certain witnesses in this case, that the defendant Langnes cannot possibly be afforded a fair trial in this circus atmosphere, and I [fol. 3035] move in his behalf for the withdrawal of a juror or a severance of his case.

THE COURT: Your motion is denied.

(Exception noted.)

MR. LIVINGSTON: I ask leave to introduce into the record at this time copies of the letter published in the Pittsburgh Press.

THE COURT: It will not be done at this time. We have an agreement as to when that may be done, and all those matters will be done at the proper time.

MR. LIVINGSTON: At a separate time.

MR. LANGNES: What the hell are you trying to prove, Judge?

THE COURT: I take it that you have the same motion, Mr. Mayberry.

MR. MAYBERRY: Yes, I have something to say that [fol. 3036] I agree with—

THE COURT: I take it that you have the same motion.

MR. MAYBERRY: I concur with Mr. Livingston's motion for a severance, and I ask for a severance as to Richard Mayberry from the other two defendants, and with the same alternatives that were expressed by Mr. Livingston, only concerning defendant Mayberry instead of defendant Langnes, and I also, upon the additional ground, that the late session last night has prejudiced my right to a fair trial in this case in that I was not returned to the penitentiary until 10:30 last night, and I wasn't able to go to sleep until 12:00 o'clock due to the fact I had to prepare my motion, written papers for today's session, and I was brought down here at 6:00 o'clock this morning. I haven't had sufficient sleep last night to be mentally alert for today's proceedings, and [fol. 3037] for those grounds I also ask for the removal of a juror or a severance or a continuance of the case

until I am sufficiently rested to proceed with this trial in a mentally alert condition.

THE COURT: I take it, Mr. Codispoti, that you have the same motion incorporating all these things.

MR. CODISPOTI: Except for the timing, Your Honor. I didn't get back to the prison until approximately 11:00 o'clock. I wasn't able to go to bed until approximately 12:30. By the time I was processed and whatnot, you know, and now I was awakened at 6:00 o'clock in the morning and I was processed to come down here. I haven't prepared my defense for the day, and I ask that the case be continued and that any further night sessions be done away with because I am—I am in the position of being processed coming and going, and that [fol. 3038] takes considerable time.

THE COURT: All right. The motions are denied individually and collectively.

(Exception noted.)

THE COURT: Now, Mr.—

MR. MAYBERRY: No, you don't deny the motion, Your Honor, because there is no ground for denying the motion. It is made and should be granted according to law. If you are going to go according to law, Your Honor, you are bound by the law just as much as I am. You just can't make an arbitrary ruling at your whim like you are God or somebody. You have to go by the law the same as we do. I refuse to accept any of the ruling on the part of the Court except the granting of my motion, and I will not—

THE COURT: You have.

MR MAYBERRY: —not abide by any other ruling [fol. 3039] of the Court other than a granting of my motion. I won't sit and be railroaded into a life sentence due to the fact that you wish to finish this trial just for the sake of convenience. It is obvious to me that there is some kind of conspiracy going on here. The district attorney's office is contacting the news media, giving all the details of my past criminal record, all the charges I am waiting for that they couldn't introduce in evidence at the trial, so they are trying to bring it in that way, in the

back door, as you are so fond of saying, by giving this same information to the jury through the local news media. I refuse to submit to these illegal and highhanded tactics on the part of the local courts and the district attorney's office. I will not sit quiet at this trial and allow you to flaunt my rights, my inalienable rights as an American citizen even though I am convicted of crimes [fol. 3040] and in the penitentiary. I refuse to submit to these type of tactics. I will not sit here and remain quiet as long as I can speak. So you either have an alternative of granting my motion or sitting here listening to me go on continually with a tirade of words. I will not be quiet at any time from now on unless my motion is granted. I will not be denied by right to a fair trial. I will not be denied my rights under the law. I will not tolerate these type of proceedings as long as I am able to offer any kind of opposition to them. Now, it is as simple as that, and that's my position, and I intend to maintain it throughout the course of these proceedings, and you understand that.

THE COURT: We will ask that this contemptible display cease. If you will only keep quiet for just two sentences I will clarify this for you. Mr. Mayberry, because I am not going to put up with this. Now keep [fol. 3041] quiet.

MR. MAYBERRY: I will not keep quiet. I will not be quiet. You are dragging justice in the mud and making a mockery of this trial.

THE COURT: Very well, Mr. Mayberry, your case is terminated. It is finished.

MR. MAYBERRY: It is not terminated.

THE COURT: Remove Mr. Mayberry from the court.

(Thereupon Mr. Mayberry was removed from the courtroom at 10:25 a.m.)

* * * *

[fol. 3044] THE COURT: May I address my remarks to all three defendants at this time and—

MR. MAYBERRY: Before you address the defend-
[fol. 3045] ants—

THE COURT: Keep quiet.

MR. MAYBERRY: Mr. Mayberry has an objection.

THE COURT: Keep quiet. I am doing this for your own protection, and keep quiet.

MR. MAYBERRY: You ruled that my case was terminated before I was able to finish it. I can't sit here quietly. I protest this action on your arbitrarily terminating my defense before I finished with my witnesses that you yourself have called all the way from Philadelphia at the expense of the County and the taxpayers, and you have ruled my defense terminated. I won't sit quiet and abide by the ruling because I haven't finished presenting my defense to the charges. I am here on a charge of prison breach and holding hostage which are serious charges. It carries life imprisonment and 10 years. You [fol. 3046] have denied me the right to present a defense to these charges by terminating my defense before I even finished.

THE COURT: Keep quiet.

MR. MAYBERRY: Because of that I will not keep quiet.

THE COURT: Remove Mr. Mayberry. You are asking for it, Mr. Mayberry.

(Thereupon Mr. Mayberry was removed from the courtroom at 11:15 a.m.)

* * * *

[fol. 3060] MR. MAYBERRY: I have a few things I want the record to note.

THE COURT: The testimony is closed, sir.

MR. MAYBERRY: No. Concerning matters that have occurred during this trial, concerning the defendant Mayberry. Now—

THE COURT: That will be done in your summation.

MR. MAYBERRY: No, I have some things I wish to state before the testimony is closed.

[fol. 3061] THE COURT: You may proceed, Mr. Mayberry.

MR. MAYBERRY: I have some objections to place on the record. I was missing during a critical stage of the proceedings, and while I was absent from the courtroom defendant Codispoti was questioning his witness Madronal

and brought out certain things directly prejudicial to me, and I wish to let it also be noted on the record that my one witness Donald Montgomery, I was refused and denied the right to present my defense through him, through no reason of mine but merely because the Court refused to let me present this witness, and this was my main defense witness to prove entrapment.

MR. MEDONIS: If the Court please—

MR. MAYBERRY: The Court terminated my case before I was permitted to present all of it.

THE COURT: I wish—

[fol. 3062] MR. MAYBERRY: I want to place an objection on the record to that.

THE COURT: Let the record show that everybody has been given a full opportunity—

MR. MAYBERRY: Not a full opportunity.

THE COURT: All right. We will remove you again. Apparently that is what you want. Remove Mr. Mayberry.

MR. MAYBERRY: Let the record show that I am absent from the critical part of the proceedings.

(Thereupon Mr. Mayberry was removed from the courtroom at 11:30 a.m.)

* * * *

[fol. 3065] (Thereupon Mr. Mayberry was returned to the courtroom at 11:35 a.m.)

THE COURT: You may proceed with your summation, Mr. Mayberry.

MR. MAYBERRY: Before I make my address to the jury, Your Honor, I ask to avail myself to the right I reserved earlier in this trial which you said I was granted, and that is to be allowed to read into the record the news items in the local newspapers which Mr. Livingston has been kind enough to gather together for the defendants.

THE COURT: That will be preserved for and on behalf of all defendants, and we will make arrangements for that.

MR. LIVINGSTON: In that respect to Mr. Mayberry there is no doubt that his rights along those lines have been amply protected.

MR. LANGNES: After some consideration, Your [fol. 3066] Honor, I decided to make a summation.

THE COURT: We will give you that right, sir. You may proceed, Mr. Mayberry.

(Thereupon Mr. Mayberry closed to the jury.)

(During Mr. Mayberry's summation):

MR. MEDONIS: If the Court please, before Mr. Mayberry goes on I would like to preserve the right to objection to anything he says in his statement rather than interrupt during the summation.

MR. MAYBERRY: That would be the proper procedure, anyway, Mr. Medonis, to wait before you make your objections until I am finished.

THE COURT: That is not quite the procedure, but we will accord that to you.

MR. MAYBERRY: That is the general rule to [fol. 3067] wait until a person is finished a summation and then make the objections, if you don't mind.

THE COURT: Mr. Mayberry, your hour is up. We will allow you an additional ten minutes at which time you will stop.

MR. MAYBERRY: I haven't gotten to my—

THE COURT: We are allowing you an additional ten minutes.

MR. MAYBERRY: I am not finished with the presentation of my summation.

THE COURT: Now, I don't want an argument.

MR. MAYBERRY: I am going to argue my case until I am finished unless you are getting where you just have to have me dragged out of here again.

THE COURT: Go on.

MR. MAYBERRY: Don't you want these facts brought out where the Commonwealth's witnesses are [fol. 3068] testifying to a bunch of irrelevant nothings? They only had two witnesses and they were half nuts anyway.

THE COURT: Members of the jury, we will now take our luncheon recess. In view of the fact that it is now a quarter to 1:00 I am going to ask you to be back here at 2:00 o'clock and we will continue with this case. Let the record show that Mr. Mayberry, having had an hour and ten minutes in summation, is now finished.

(Thereupon court recessed at 12:45 p.m.)

(After recess at 2:00 p.m.)

THE COURT: Mr. Langnes, there appears some doubt this morning as to whether or not you desire to change your opinion as to summation. If your position is still the same as it was this morning of course we will proceed.

[fol. 3069] MR. MAYBERRY: Before defendant Langnes—

THE COURT: Keep quiet, Mr. Mayberry. If your position is still the same as has been this morning of course we will go on. Do you wish to make a summation or closing argument to the jury?

MR. LANGNES: Yes, sir.

MR. MAYBERRY: Before defendant Langnes makes his summation I ask to be permitted to finish mine because due to the lengthy nature of this case I was not able to finish summing up to the jury this morning, so I ask to be given as much time as necessary to finish my summation to the jury.

THE COURT: The Court has already ruled on that, Mr. Mayberry. You may proceed, Mr. Langnes.

MR. MAYBERRY: I wish to finish my summation, and I am going to finish it, either here or be gagged, or [fol. 3070] else be removed from the courtroom, but I am not going to sit here silent until I get a chance to finish summing up my case to jury. So it is a matter of which you would rather do allow me to finish or gag me and have me removed from the courtroom, because I will not sit here silent and allow you to run roughshod over me without speaking out against it.

THE COURT: You may proceed, Mr. Langnes.

MR. MAYBERRY: Ladies and gentlemen, as I was stating this morning, the Commonwealth's witness was Guard Klym, and—

THE COURT: You are asking for it, you are asking for it. Take him out.

MR. MAYBERRY: Guard Klym testified—

THE COURT: Take him out.

(Thereupon Mr. Mayberry was removed from the courtroom at 2:05 p.m.)

[fol. 3075] THE COURT: Before you proceed, Mr. Medonis, I would like to have the defendant Mayberry brought in.

(Thereupon Mr. Mayberry was returned to the courtroom at 3:42 p.m.)

THE COURT: Let the record show that Mr. Mayberry is here before the Commonwealth sums up. You may proceed, Mr. Medonis.

MR. MAYBERRY: I haven't finished my summation to the jury. I haven't finished presenting my evidence, and I refuse to sit here quiet until I have been given an opportunity to present my defense, to finish my case, which has so far been denied to me, and for that reason I am going to continue my speech to the jury until I finish my summation.

THE COURT: You just think you are, Mr. Mayberry. I have asked you to be brought in here solely for the purpose that you may hear the summation of the Commonwealth in which you might be interested. If you are going to tell me—

MR. MAYBERRY: If I would be interested in hearing it. First I would like to complete my summation before—

THE COURT: You have already finished Mr. Mayberry.

MR. MAYBERRY: I haven't finished.

THE COURT: Everything is on the record, and I am not going to hear that, Mr. Mayberry.

MR. MAYBERRY: I am not finished.

THE COURT: Yes, you have, sir.
MR. MAYBERRY: No, I haven't.
THE COURT: Yes, you have, sir.
MR. MAYBERRY: Ladies and gentlemen, as I was saying—
THE COURT: All right. You have asked for it. Let the record show that Mr. Mayberry has been given a full opportunity to be present. He prefers not to abide by the directives of the Court, and Mr. Mayberry may be removed from this courtroom.

(Thereupon Mr. Mayberry was removed from the courtroom at 3:43 p.m.)

* * * *

[fol. 3089]

Friday, December 9, 1966
Pittsburgh, Pennsylvania

MR. MAYBERRY: Before Your Honor begins the charge to the jury defendant Mayberry wishes to place his objection on the record to the charge and to the whole proceedings from now on, and he wishes to make it known to the Court now that he has no intention of remaining silent while the Court charges the jury, and that he is going to continually object to the charge of the Court to the jury throughout the entire charge, and he is not going to remain silent. He is going to disrupt the proceedings verbally throughout the entire charge of the Court, and also he is going to be objecting to being forced to terminate his defense before he was finished.
[fol. 3090] THE COURT: I would suggest, Mr. Mayberry, that you remain quiet now.
MR. MAYBERRY: I am also going to object to being forced to stop—
THE COURT: I am going to give the charge of this Court, Mr. Mayberry, and you are not going to stop me.
MR. MAYBERRY: I will not—
THE COURT: Guards, remove the defendant. We will take a short recess, and bring this defendant back in such a situation so that he can no longer interrupt the proceedings.

MR. CODISPOTI: You had better set the motion for defendant Codispoti if you intend to gag defendant Richard Mayberry.

THE COURT: Take Mr. Codispoti as well.

MR. CODISPOTI: You are not going to gag him [fol. 3091] and make me stay quiet.

THE COURT: We are not going to put up with any monkeyshines any longer.

MR. CODISPOTI: You have been making them for five weeks.

THE COURT: We will take a short recess, members of the jury.

(Thereupon a recess was had at 9:50 a.m.)

(After recess at 10:10 a.m.)

MR. LANGNES: Before you proceed with the points of the charge to the jury I want to say one thing definitely clear. I object to what you did to my two co-defendants, and I swear on my mother's name that I will keep my promise to you, the two threats I made. Don't worry about me interrupting during your summation. I won't even dignify these stinking proceedings, punk, go to hell, and I will shake hands in hell with you. I will [fol. 3092] be damned to you.

MR. MAYBERRY: (Through gag) Defendant Mayberry objects, objects, objects to the whole proceedings, and he refuses to take any part in these proceedings, and he will continually object throughout the whole stinking, lousy, mockery that you are making of what is supposed to be a trial, and as long as he can make any noise through his nose, ears, mouth, or any other way he will continue to object in any way possible through this whole proceedings. He refuses to be quiet in this courtroom while you, the Judge, dismiss many basic fundamental rights that he has as an American citizen which you obviously—

THE COURT: We obviously can't go on this way. I can't go on this way. I must have peace and quiet to make my charge to the jury. I cannot do it under these

[fol. 3093] circumstances. Is there anything we can do to try to keep Mr. Mayberry quiet?

MR. CODISPOTI: (Through gag) You can try knocking me in the head with a sledge hammer. Maybe that will keep me quiet. Maybe that would be befitting with the proceeding going on.

THE COURT: I must charge the jury.

(Thereupon Mr. Codispoti, Mr. Mayberry, and Mr. Langnes were removed from the courtroom at 10:15 a.m.)

(Thereupon a recess was had at 10:15 a.m.)

(After recess at 10:25 a.m.)

MR. MAYBERRY: (Through gag) (Grunt, grunt, grunt, grunt, grunt, grunt, grunt, grunt, grunt.)

MR. CODISPOTI: (Through gag) (Grunt, grunt, grunt, grunt, grunt.)

[fol. 3094] THE COURT: We will take a recess and find some other solution. Some other solution must be found where I can have the opportunity of addressing the members of the jury. I might state for the record that under the law the accused defendants here must be present during the charge of the Court. That is the law, and therefore we have tried to make it possible that they be present to hear the charge and to proceed with the charge without interruption. Apparently this will not work out, so we have to make some other possible solution to this because I must deliver my charge to you before you can consider this case. We will take a recess.

MR. CODISPOTI: (Through gag) That's right.

MR. LANGNES: You are a dead man, stone dead, Your Honor.

(Thereupon a recess was had at 10:27 a.m.)

[fol. 3094a] December 12, 1966 1:00 P.M.
Pittsburgh, Pennsylvania

MR. LIVINGSTON: If it pleases the Court, without causing any additional delay, to protect the record on behalf of the defendant Langnes, I now move for a withdrawal of a juror and a continuance of the case in view of the fact that the two co-defendants have been gagged and strait-jacketed. I submit to the Court that the defendant Langnes has been highly prejudiced by this order, which I do not criticize, but I would ask that on his case at least that a juror be withdrawn or his case be severed at this time.

THE COURT: That motion is denied.

(Exception noted.)

THE COURT: Before I proceed with the charge I think that the record should show what has transpired since this morning because the record is silent.

[fol. 3094b] Let the record show that after attempts have been made by the Court to give its charge to the jury, the defendant Mayberry and defendant Codispoti were placed in strait-jackets and gagged and returned to courtroom number 7, and that thereafter disturbances continued to such an extent that the Court was unable to render its charge to the jury.

Thereafter a recess was called and the proceedings were removed from courtroom number 7 to courtroom number 4 where facilities have been installed for a loud speaker system.

Let the record show that the defendant Mayberry and defendant Codispoti have been brought into court but conducted to a room immediately adjacent to the courtroom where a loud speaker system has been installed and that the record of these proceedings are clearly audible to them.

Let the record further show that the defendant Langnes together with his counsel are present in the courtroom and will be in a position not only to hear but to [fol. 3094c] see the entire proceedings.

MR. LANGNES: Before you begin your summation—

THE COURT: I don't want any more.

MR. LANGNES: I don't have any intention of interrupting you during your summation, but I want to make it clear for the record, and I want the public to understand my words specifically, that like I have stated this morning, I highly and indignantly object to the conduct that you have treated my two co-defendants to. They were merely voicing for their rights, and you arbitrarily denied their rights, and I think that your conduct was tantamount to a communist sadist. That's all I have to say, Your Honor.

MR. LIVINGSTON: Does the Court intend to leave the door open where the parties are sitting?

THE COURT: It is the intention of the Court that the door will be let open unless the disturbance becomes such that we will be compelled to close it.

[fol. 3095]

ORAL CHARGE OF THE COURT

FIOK, J.
GOODWORTH, R.

THE COURT: Members of the Jury, you have been attentively listening to an unusually long case in which it took five weeks to present the evidence. I say to you frankly that all the relevant evidence in this case could and should have been submitted in four days but the for obviously contemptuous conduct of the defendants in this case, and the attempts to present evidence having no probative value determinative of any of the issues involved and for rulings necessitated by attempts to introduce improper evidence.

In this respect you have had the experience of witnessing a trial so utterly horrendous and disgusting in nature that certainly has never been equalled in the annals of this Commonwealth of Pennsylvania, and probably not even in the annals of any state in the union.

* * * *

[fol. 3219] SENTENCE

THE COURT: Let's proceed. Herbert F. Langnes, Richard Joseph Oliver Mayberry, and Dominick Codispoti, during the trial on charges of holding hostages and for prison breach you have conducted yourselves with such utter contempt of court and such outrageous defiance of and scorn for judicial proceedings that seems unequaled in judicial history. You have deliberately heaped ridicule upon orderly proceedings, and have by your words and actions knowingly intended to impair, taint, and undermine the respect and confidence of the public in our Criminal Courts.

You have by your contumacious conduct attempted to create a circus atmosphere and a sham of this trial. Your actions have created an atmosphere highly detrimental to the proper administration of justice.

You have abused and ridiculed the trial proceedings, defied Court orders, addressed vulgar, sourrilous, and insulting language to the Court, and have wilfully baited the Court in your efforts to obtain a mistrial.

Your actions have brought consternation to the adherence of justice under law and have brought joy and delight in the hearts of abettors bent on destruction of our [fol. 3220] very system of social order and administration.

You have given false hope or aspiration to others to attempt to repeat your disgusting tactics. You have attempted to undermine the very structure of that institution in which you sought the protection of your rights as defendants, and have mistakenly construed the patience of the Court for license to heap your detestable abuse upon it.

You have accused this Court of criminal conspiracy with prison officials to obstruct justice and of entering into a conspiracy with the news media to leak out unwarranted and improper information to poison the minds and inflame the jury. You have made unmitigated attacks on the trial Judge, threatening his life, and referring to him as a dirty S.O.B., a bum, a tyrant, an idiot, a creep, a punk, a fool, a dirty stumbling old dog, a nut,

a Caesar, of being crazy, of conducting a Gilbert and Sullivan comic opera, and of infiltrating the courts with communist tactics.

The Court has endured this day by day outrageous conduct and waited for the disposition of open rebellion and contempt only because of its concern for a fair and impartial trial, and of the impact on the spot punishment might have had on the jury.

I want you and all others inclined towards such con- [fol. 3221] tumacy to know that the Court is charged with the duty of being the primary protector of its judicial dignity and conscience, and of its public standing as a judicial forum.

The time is ripe to protect the interest of the general public in the administration of justice, and to punish for direct criminal contempt I shall impose punishment only for the more glaring acts of contempt.

Richard Mayberry, stand. Richard Mayberry, on November 10, 1966, you have committed a contempt of court by referring to the Court as a "dirty S.O.B." It is the sentence of this court that you be confined by separate and solitary confinement at labor to the State Correctional Institution at Pittsburgh, Pennsylvania for a term of not less than one year nor more than two years, to take effect upon the expiration of the sentence you are now serving.

On November 18, 1966, you have referred to the Court as a Gilbert and Sullivan show, and accused the Court of not knowing how to rule on questions. For this contempt you are sentenced to the State Correctional Institution at Pittsburgh, Pennsylvania for a period of not less than one year nor more than two years, to take effect upon the expiration of the first sentence I have imposed.

On November 23, 1966, you have accused the Court [fol. 3222] of railroading you into a life sentence, and by referring to the Court as a "dirty, tyrannical old dog." It is the sentence of this court that you be confined in the State Correctional Institution at Pittsburgh, Pennsylvania for a period of not less than one year nor more than two years, and this sentence to take effect upon

the expiration of the previous sentences I have just imposed.

On November 28, 1966, you have directed the Court to "keep its mouth shut" when it tried to quiet you down, and while you were questioning your own witness. It is the sentence of this court that you be confined to the State Correctional Institution at Pittsburgh, Pennsylvania, for a period of not less than one year nor more than two years, to take effect upon the expiration of the sentence previously imposed.

On November 29, 1966, you have accused the Court of being "a bum," and working for the prison authorities, of going to hell, of not giving a good G.D. on the Court's suggestions, referring to the Court as a "stumbling dog," and referring to the proceedings as B.S., and inviting the Court to gag you. For these contempts it is the sentence of this court that you be confined in the State Correctional Institution at Pittsburgh, Pennsylvania, for a pe-[fol. 3223] riod of not less than one year nor more than two years, to take effect upon the expiration of the sentence previously imposed.

On December 1, 1966, you directed the Court to keep quiet, of not caring how the Court ruled, and of refusing to remain quiet, that the only way that you will be quiet is to be gagged. You addressed the Court in an insolent manner as follows: "Now, what do you want me to do? Just force me to sit here to be continually being prejudiced by all this here furor and all that is going on?" For this contempt of court it is the sentence of this court that you be confined to the State Correctional Institution at Pittsburgh, Pennsylvania, for a period of not less than one year nor more than two years, this sentence to take effect upon the expiration of the previous sentence that has been just imposed.

On December 2, 1966, you referred to the Court as a "Sullivan" and to the district attorney as a "Gilbert." You have accused the trial Court of conducting a "Spanish inquisition," of railroading you, by the Court, to "a life bit," of being a nut, and "in need of psychiatric treatment," of "doing a good job for Warden Maroney there," and of stating, "but let's keep it looking decent, anyway,

you know. Don't make it so obvious, Your Honor." For [fol. 3224] this contempt of court it is the sentence of the court that you be confined to the State Correctional Institution at Pittsburgh, Pennsylvania, for a period of not less than one year nor more than two years, and that this sentence to take effect upon the expiration of the previous sentence imposed.

On December 5, 1966, you referred to the conduct of the trial "as the craziest trial I have ever seen." You have refused to abide by the rulings of the court in stating, "I don't care if it is contempt or not, but I want a ruling that I am being denied the witnesses I asked for months before the trial began." For this contempt of court you are sentenced to the State Correctional Institution at Pittsburgh, Pennsylvania, for a period of not less than one year nor more than two years, to take effect upon the expiration of the sentence previously imposed.

On this date you have also referred to the Court in scurrilous manner as follows, "I know what the hell you have done, you creep. What do you do, eat at the same club as him"—referring to Superintendent Maroney—"every night? Scared of certain facts that might be brought out?", of stating to the Court in an insolent manner, "Ah, nothing is enough. It's enough when I feel like saying it's enough," and stating to the Court, [fol. 3225] "I will like hell. I will like hell," adhere to the ruling of the Court. I am not making a separate sentence for that.

On December 6, 1966, you have made reference to the Court as a "fool." For this contempt it is the sentence of this court that you be confined to the State Correctional Institution at Pittsburgh, Pennsylvania, for a period of not less than one year nor more than two years, this sentence to take effect upon the expiration of the previous sentence imposed.

On December 7, 1966, you have created a despicable scene in refusing to continue calling your witnesses and in creating such consternation and uproar as to cause a termination of the trial. For this contempt of court you are sentenced to a period of not less than one year

nor more than two years in the State Correctional Institution at Pittsburgh, Pennsylvania, this sentence to take effect upon the expiration of the previous sentence imposed.

On December 9, 1966, you have constantly, boisterously, and insolently interrupted the Court during its attempts to charge the jury, thereby creating an atmosphere of utter confusion and chaos. For this contempt of court it is the sentence of this court that you be confined in the State Correctional Institution at Pittsburgh, Pennsyl-
[fol. 3226] vania, for a period of not less than one year nor more than two years, this sentence to take effect upon the expiration of the previous sentence imposed.

Now, for the charges on which you have been convicted of holding a hostage—

MR. MAYBERRY: Wait a minute, now—

THE COURT: —in a penal institution—

MR. MAYBERRY: —concerning the contempt proceedings—

THE COURT: —it is the sentence of this court that you be confined to the State Correctional Institution at Pittsburgh, Pennsylvania by—

MR. MAYBERRY: —I wish to—

THE COURT: —separate and solitary confinement at labor for a term of not less than fifteen years nor more than thirty years, to take effect upon the expiration of any sentence you are now serving.

On prison breach on which you have been convicted, it is the sentence of this court that you be confined by separate and solitary confinement at labor to the State
[fol. 3227] Correctional Institution at Pittsburgh, Pennsylvania, for a term not less than five years nor more than ten years, to take effect upon the expiration of any other sentences previously imposed, or those which you are serving.

You may remove Mr. Mayberry.

(Thereupon Mr. Mayberry was removed from the courtroom.)

* * * *

SUPREME COURT OF THE UNITED STATES

No. 657 Misc., October Term, 1969

RICHARD MAYBERRY, PETITIONER

v.

PENNSYLVANIA

On petition for writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania, Western District.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1389 and placed on the summary calendar.

April 6, 1970

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 409888 338

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 121

RICHARD O. J. MAYBERRY,

Petitioner,

v.

PENNSYLVANIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The majority and dissenting opinions of the Pennsylvania Supreme Court are reported at 434 Pa. 478, 255 A.2d 131 (1969) and are reproduced in the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment Eight to the Constitution of the United States of America:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

2. Amendment Fourteen to the Constitution of the United States of America:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. Pennsylvania Contempt Statute. Act of June 16, 1836, P.L. 784, § 23; Pa. Stat. Ann. tit. 17, § 2041 (1962):

> "The power of the several courts of this commonwealth to issue attachments and to inflict summary punishments for contempts of court shall be restricted to the following cases, to-wit:
>
> I. To the official misconduct of the officers of such courts respectively;
> II. To disobedience or neglect by officers, parties, jurors or witnesses of or to the lawful process of the court;
> III. To the misbehavior of any person in the presence of the court, thereby obstructing the administration of justice."

QUESTIONS PRESENTED

I. Whether, in a serious criminal contempt case, founded upon alleged misbehavior in the presence of the court thereby obstructing the administration of justice, and prosecuted at the conclusion of the proceeding in which the charged contempts occurred, the defendant is entitled to the basic requisites of due process of law: notice of the charges and the opportunity to be heard in defense or mitigation.

II. Whether prosecution of a serious charge of criminal contempt against an unrepresented indigent defendant, who had not waived counsel, violates the right to counsel guaranteed by the Sixth and Fourteenth Amendments.

III. In the circumstances of this case, was petitioner entitled to have his criminal contempt charges heard by a judge other than the judge who presided over the trial out of which those charges arose?

IV. Whether the Pennsylvania criminal contempt statute, as applied to petitioner, is unconstitutionally vague.

V. Whether the 11 to 22 year sentence imposed upon petitioner for contumacious misbehavior in court constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution.

STATEMENT OF THE CASE

This is a State criminal contempt case, from Pennsylvania. Petitioner received a sentence of 11 to 22 years for misbehavior during a State criminal prosecution in which he was a defendant. The 11 to 22 year term is consecutive to the sentences received for the conviction of the crimes in the underlying prosecution.

On November 7, 1966, petitioner and two co-defendants were brought to trial in a criminal prosecution that would eventually last for all or part of twenty-two days. Defendants were charged with prison breach and with holding hos-

tages in a penal institution. Each of the defendants acted as his own counsel. The jury returned a verdict of guilty of both charges against all defendants on Friday evening, December 9, 1966, the twenty-first day of the trial. (Tr. 3209).* The following Monday, December 12, the defendants were brought before the court for sentencing. Prior to imposing sentences on the verdicts, the trial judge summarily pronounced the defendants guilty of criminal contempt and imposed the 11 to 22 year sentence upon petitioner. (Tr. 3219-3226). Contempt sentences were also imposed upon petitioner's co-defendants. (Tr. 3227-3237).

The contempt prosecution had not been preannounced. At no point during the trial and prior to that sentencing session did the court actually cite the petitioner for contempt or declare that a contempt prosecution would be initiated. There were some few occasions when the court characterized the defendant's behavior in terms of contempt. On the first such occasion, during the eighth day of the trial, the court indicated that he felt the defendants had shown contempt toward the court, but he expressly declined to say that he was holding them in contempt and declared that he would take care of that matter at a later stage. (Tr. 1264). On the seventeenth day, the court made a statement that petitioner was committing a contempt of court and had previously committed "innumerable contempts." (Tr. 2591). Later that same day, after adjournment, the court announced that the defendants had been performing "a three ring circus" and "the court does not intend to let you get away with it." (Tr. 2614). There were also references in passing to "contemptuous outbursts" (Tr. 2790), "contemptible display" (Tr. 3040), and "obviously contemptuous conduct" (Tr. 3095). At none of these occasions, however, did the trial judge indicate that formal criminal contempt charges would be brought against petitioner. No citation or rule to

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*References are to pagination in the typed Transcript of Proceedings in the trial court. The original paging is indicated in the Appendix.

show cause was issued. No hearing of any kind was conducted.

After the contempt sentences had been pronounced, petitioner attempted to speak to the court "concerning the contempt proceedings." (Tr. 3226). His effort was futile. The trial judge declined to hear him and continued to pronounce the sentences on the verdicts. At the conclusion of that, he directed that petitioner be removed from the courtroom. (Tr. 3227).

The trial court's method of fixing sentence in the contempt proceeding was *per diem*. He found that petitioner had committed one or more contempts on eleven of the previous twenty-one days of trial. Without regard to the quality or duration of the conduct involved, a uniform sentence of not less than one nor more than two years was fixed for each day.

As will be seen in the description of the conduct held to be contempt, there was a wide disparity in the types of behavior involved. Most were verbal sallies of brief duration, including for example petitioner's statements: "I ask Your Honor to keep your mouth shut while I'm questioning my own witness," (Tr. 1793; 3222); and "This is the craziest trial I have ever seen" (Tr. 2504; 3224). In two instances, a series of outbursts led the trial judge to have petitioner bound and gagged or to have him removed from the courtroom altogether. (Tr. 2917-2941, 2948-2950, 3018-3021; 3089-3094c; 3225-3226).

It is impossible in this statement of facts to recount the full course of events that occurred during those twenty-one days. The entire record is before the Court. It alone can reveal the extent to which petitioner's behavior influenced the conduct of his trial. We will focus here on the events cited by the trial judge in his statement finding defendants guilty of contempt.

FIRST CHARGE

Petitioner's first charge of contempt arose from the proceedings early in the first day of his trial. Court opened with a panel of jurors ready to be examined. (Tr. 4-5). Discussion ensued concerning the decision of the defendants to represent themselves and the role of appointed counsel as their advisers. (Tr. 5-25). During that colloquy, the trial judge indicated to one of petitioner's co-defendants, who was then at side bar, that there would be no side-bar conferences with the defendants during the rest of the trial. (Tr. 19-20). Petitioner came to side bar and was told that he, too, would be denied any future opportunity to address the court out of the hearing of the jury. (Tr. 26-29). The court declared that he had no objection to the defendants making a statement in open court. (Tr. 28).

Petitioner then took up the question of defense witnesses. The court had previously ruled that many witnesses requested by the defense would not be allowed. (Tr. 30-31). The court further declared that the defendant would not be permitted to read into the record what he intended to prove by those witnesses. (Tr. 33).

The number of peremptory challenges allowed to the three defendants was raised. (Tr. 35). The judge indicated that there would be no more such challenges permitted than would be allowed to a single defendant, and that the defendants were denied a severance. (Tr. 36, and see 49-50).

Petitioner asked that the courtroom be arranged so that the defendants could confer among themselves and with their legal advisers without being overheard by the prosecution. Evidently there was a single counsel table shared by both prosecution and defense. (Tr. 38-39).

Petitioner asked that the police officers be directed not to disclose to others anything they might overhear. (Tr. 39). The court declined to take any action. (Tr. 40).

Petitioner objected to the unusually large number of uniformed and armed police in the courtroom (Tr. 40-41). His objection was denied. (Tr. 41).

Lastly, petitioner asked to have the prosecution witnesses sequestered. This motion too was denied (Tr. 41).

Thereupon, the following exchange occurred (Tr. 41-42):

"MR. MAYBERRY: Your Honor, I object to all these overrulings.

"THE COURT: You automatically have an exception.

"MR. MAYBERRY: I would like to have a fair trial of this case and like to be granted a fair trial under the Sixth Amendment.

"THE COURT: You will get a fair trial.

"MR. MAYBERRY: It doesn't appear that I am going to get one the way you are overruling all our motions and that, and being like a hatchet man for the State.

"THE COURT: This side bar is over.

"MR. MAYBERRY: Wait a minute, Your Honor.

"THE COURT: It is over.

"MR. MAYBERRY: You dirty sonofabitch."

In the summary conviction of the petitioner for contempt, the trial judge described the first charge:

"Richard Mayberry, on November 10, 1966, you have committed a contempt of court by referring to the Court as a 'dirty S.O.B.'" (Tr. 3221). The stated date is in error. The incident quoted above took place on November 7, 1966. The sentence for this contempt was "separate and solitary confinement at labor . . . for a term of not less than one year nor more than two years . . ." (Tr. 3221).

SECOND CHARGE

The second charge was based upon an exchange that took place during the cross examination of Charles J. Carrothers, major of the guard at the correctional institution involved in the prison breach indictment. (Tr. 1187). This occurred

on the eighth day of the trial, shortly after the noon recess. (Tr. 1236). Cross examination was being conducted by Mr. Codispoti, a co-defendant. (Tr. 1194-1205, 1217-1265). Mr. Codispoti asked the witness about a conversation that took place between Codispoti and the warden shortly after the prison breach incident. (Tr. 1256-1258). The prosecutor objected and the court sustained the objection. The court declared: "I am going to prohibit you from asking any questions of things that occurred after June 27, 1965." (Tr. 1258). During a further exchange with Mr. Codispoti, the court said: "You are out of order, Mr. Codispoti. I don't want any outbursts like that again. This is a court of justice. You don't know how to ask questions." (Tr. 1259). Petitioner replied: "Possibly Your Honor doesn't know how to rule on them," and added: "You ought to be Gilbert and Sullivan the way you sustain the district attorney every time he objects to the questions." (Tr. 1259). The court responded: "Are you through? When your time comes you can ask questions and not make speeches." (Tr. 1259).

Petitioner was summarily sentenced to two years imprisonment for this statement. The court characterized it thus:

> "On November 18, 1966, you have referred to the Court as a Gilbert and Sullivan show, and accused the Court of not knowing how to rule on questions. For this contempt you are sentenced to [prison] for a period of not less than one year nor more than two years, to take effect upon the expiration of the first sentence I have imposed." (Tr. 3221).

THIRD CHARGE

All the subsequent charges occurred during the introduction of evidence for the defense and the closing procedures of the trial. The third charge stemmed from examination of an inmate, Harold DeMino. (Tr. 1537-1659). DeMino was the third witness called by the defense. (Tr. 1449-1537).

The Commonwealth had rested on the ninth day of the trial (Tr. 1379), and the incident involved in the third charge took place in the morning of the eleventh trial day.

Co-defendants Langnes had led off with his examination of the witness. (Tr. 1537-1593). Petitioner took up from there. Several times, the trial judge intervened without waiting for the prosecutor to object. (Tr. 1596-1599, 1602-1603, 1605, 1607, 1609). Petitioner asked the judge not to badger the witness. (Tr. 1609). The court responded: "You let me handle my share of it, and you handle yours. . . . Don't try to be judge at the same time. Just handle your case. I will be the judge." (Tr. 1609). Petitioner turned to the part of the incident in which he had been captured. (Tr. 1611). The court refused to permit petitioner to develop from the witness whether he had seen the petitioner resisting arrest or fighting with the arresting officers. (Tr. 1615-1617).

Next petitioner, trying to establish a defense of entrapment, took up with the witness conversations between prison officials and other inmates. Again the court intervened. (Tr. 1619). Petitioner protested to the court's taking examination of the witness out of his hands. (Tr. 1619). After further efforts to use the witness to show the alleged entrapment were blocked by successful prosecution objections, petitioner declared: "Now, I'm going to produce my defense in this case and not be railroaded into any life sentence by any dirty, tyrannical old dog like yourself." (Tr. 1627).

In the court's summary conviction of contempt, this incident is described as follows: "On November 23, 1966, you have accused the Court of railroading you into a life sentence, and by referring to the Court as a 'dirty, tyrannical old dog.'" A consecutive sentence of not less than one nor more than two years was imposed. (Tr. 3221-3222).

FOURTH CHARGE

The fourth charge of contempt against petitioner was based upon events during the next trial day, although a long Thanksgiving Day recess had intervened. The fourth defense witness, Alfred J. Nardi, Jr., was on the stand. Following cross examination (Tr. 1787-1791), petitioner undertook redirect examination of the witness. (Tr. 1791). The witness gave an answer which appeared to petitioner to be a mistake. (Tr. 1792). After another question was put and the witness had corrected himself, petitioner asked him whether he had understood the prior question. The court, again without objection by the district attorney, interrupted: "He answered your question. Let's go on." (Tr. 1792). Petitioner started to explain: "I am asking him now if he understands–" and the trial judge interrupted again: "He answered it. Now, let's go on." (Tr. 1793). In this context, petitioner stated: "I ask Your Honor to keep your mouth shut while I'm questioning my own witness. Will you do that for me?" The judge responded: "I wish you would do the same. Proceed with your questioning." (Tr. 1793).

In the summary contempt proceeding, the court described this incident thusly: "On November 28, 1966, you have directed the Court to 'keep its mouth shut' when it tried to quiet you down, and while you were questioning your own witness." (Tr. 3222). The usual sentence followed: confinement for a period of not less than one year nor more than two years to take effect upon the expiration of the sentence previously imposed. (Tr. 3222).

FIFTH CHARGE

The next charge concerned an exchange that took place at the outset of the thirteenth trial day. Petitioner protested that he was being confined during the trial under conditions that prevented him from preparing his defense. Among other things, he declared that he was being denied his legal papers and any facilities for writing. (Tr. 1834-1835). The

initial responses of the court were: "You made that statement yesterday" and "That is your statement and a collateral issue we are not going into. Proceed." (Tr. 1835, 1836). The discussion continued:

"THE COURT: We are not going into any collateral issues here. What may or may not be said by others has nothing to do with this. The question is whether or not a proper and fair trial is given to you in this court. You have a right to object to anything that you think is improper as to matters that occur in court. As to what happens after you leave the courtroom and then taken back to the prison is a matter that has to be taken up with the prison officials.

"MR. MAYBERRY: But when it interferes with my right to a fair trial–

"THE COURT: I don't see that it does.

"MR. MAYBERRY: I can't prepare my legal papers.

"MR. LIVINGSTON [Adviser for a co-defendant]: I have been asked by defendant Langnes to make a motion at this time in which the Court is being asked to direct the prison authorities to allow these defendants to at least have their legal documents wherever they are confined. I think they are entitled to that and ask the Court for it.

"MR. MAYBERRY: I have a Federal court order ordering the prison authorities not to take my legal papers away from me no matter where I am, and they are in direct violation with the Federal court order.

"THE COURT: I suggest you take it up with the Federal court.

"MR. MAYBERRY: You're a judge first. What are you working for? The prison authorities, you bum?

"MR. LIVINGSTON: I have a motion pending before Your Honor.

"THE COURT: I would suggest–

"MR. MAYBERRY: Go to hell. I don't give a good God damn what you suggest, you stumbling dog."

(Tr. 1837-1839). The trial judge denied Mr. Livingston's motion. (Tr. 1840). Thereupon, Codispoti and Langnes launched into a tirade against the judge. (Tr. 1841-1842). At the conclusion, petitioner added: "You started all this bullshit in the beginning." (Tr. 1842). The trial judge three times admonished petitioner to keep quiet. To the last, petitioner responded with a question: "Are you going to gag me?" (Tr. 1842).

The trial judge called for a recess, and immediately thereafter stated for the record that he had called the superintendent of the prison and instructed him to turn the defendants' legal papers over to them. (Tr. 1842-1843). This accomplished, the trial resumed.

When this incident is recorded in the summary contempt findings, it was stated as follows: "On November 29, 1966, you have accused the Court of being 'a bum,' and working for the prison authorities, of going to hell, of not giving a good G.D. on the Court's suggestions, referring to the Court as a 'stumbling dog,' and referring to the proceedings as B.S., and inviting the Court to gag you. For these contempts it is the sentence of this court that you be confined in [prison] for a period of not less than one year nor more than two years, to take effect upon the expiration of the sentence previously imposed." (Tr. 3222-3223).

SIXTH CHARGE

On December 1, 1966, the fifteenth day of the trial, co-defendant Langnes took the stand in his own behalf. (Tr. 2152). Up to that point, the defendants had been proceeding under an arrangement worked out with the court whereby each witness, as he was called, was examined *seriatim* by the three defendants on direct examination. (Tr. 1383-1390). This procedure had been suggested by the trial judge as his preference. (Tr. 1383). The same agreement apparently covered the testimony of the defendants themselves. (Tr. 1389-1390). Although that pattern had been followed for

five trial days, it was broken when Langnes took the stand. The court refused to allow petitioner to examine Langnes on direct examination after Langnes had finished testifying in his own behalf. (Tr. 2192-2193, 2200-2202). After a lunch recess, petitioner asked again for clarification on the order of presenting evidence. (Tr. 2218-2219). The court made no clarifying explanation, but ordered the trial to proceed. (Tr. 2219-2220). Petitioner asked once again for guidance and, receiving none, desisted. (Tr. 2221).

Meanwhile, Langnes had called the other co-defendant, Codispoti, to the stand. (Tr. 2209). When Langnes persisted in asking questions ruled out of order by the court, the judge directed Codispoti to step down. (Tr. 2264). Petitioner renewed his question concerning manner of proof in order to examine Codispoti. The court again refused to permit petitioner to examine. (Tr. 2264-2266).

After a brief witness, Langnes called petitioner to the stand. The court ordered that another inmate witness testify first. (Tr. 2275-2278). That witness, Kenneth Souders, was sworn. Langnes asked for a chance to speak to the witness before examining him on the ground that he wanted to go over the witness' testimony and refresh his recollection. (Tr. 2278). Petitioner joined the protest, and the judge declared: "This is not your witness, Mr. Mayberry. Keep quiet." (Tr. 2279). Petitioner rejoined that Souders was his witness also, and that the defense has the same right as the prosecution to speak to its witnesses prior to putting them on the stand. (Tr. 2279-2280). The court interrupted petitioner's argument:

> "THE COURT: Now, I have ruled, Mr. Mayberry.
>
> "MR. MAYBERRY: I don't care what you ruled. That is unimportant. The fact is–
>
> "THE COURT: You will remain quiet, sir, and finish the examination of this witness.
>
> "MR. MAYBERRY: No, I won't be quiet while you try to deny me the right to a fair trial. The only

way I will be quiet is if you have me gagged. Now, if you want to do that, that is up to you; but in the meantime I am going to say what I have to say. Now, we have the right to speak to our witnesses prior to putting them on the stand. That is an accepted fact of law. It is nothing new or unusual. Now, you are going to try to force us to have our witness testify to facts that he has only a hazy recollection of that happened back in 1965. Now, I believe we have the right to confer with our witness prior to putting him on the stand.

"THE COURT: Are you finished?

"MR. MAYBERRY: I am finished.

"THE COURT: Proceed with your examination." (Tr. 2280-2281).

Langnes started to examine Souders, but almost immediately stopped. (Tr. 2283). An extraordinarily heated exchange between the trial judge and both Langnes and Codispoti ensued. (Tr. 2283-2287). Petitioner asked for a severance "because of all this." (Tr. 2287). It was refused. Petitioner replied: "Now, what do you want me to do? Just force me to sit here and be continually being prejudiced by all this here furor and all that is going on?" (Tr. 2287-2288). The court answered: "You have had your share of it, sir." (Tr. 2288). The court then precluded Langnes from asking the witness any questions, and petitioner and Codispoti declined to examine. (Tr. 2288-2289).

This transaction is described in the summary contempt finding against petitioner as follows: "On December 1, 1966, you directed the Court to keep quiet, of not caring how the Court ruled, and of refusing to remain quiet, that the only way that you will be quiet is to be gagged. You addressed the Court in an insolent manner as follows: 'Now, what do you want me to do? Just force me to sit here to be continually being prejudiced by all this here furor and all that is going on?'" (Tr. 3223). The one to two year sentence, again consecutive, was imposed "for this contempt."

SEVENTH CHARGE

The seventh charge brackets two fairly widely separated events that took place on the sixteenth trial day. At the outset of that day, co-defendant Langnes rested. (Tr. 2299). Petitioner's defense ensued, and he called Langnes back to the stand. (Tr. 2301). A series of objections to the form of petitioner's questions was made. (Tr. 2305, 2306, 2307, 2308, 2312, 2313, 2314). Langnes testified that, prior to the prison breach incident, one of the guards had been extremely tense. The prosecutor objected. Before the court ruled, petitioner said: "No. Don't state a conclusion because Gilbert is going to object and Sullivan will sustain. Give me facts. What leads you to say that?" (Tr. 2314). The examination continued without comment from the court.

A substantial part of petitioner's examination was devoted to trying to prove entrapment. The court permitted introduction of testimony of conversations between prison officials and inmates concerning plans to entrap petitioner, but refused to admit testimony concerning the acts of the inmates in carrying out those plans, the motives of the officials for implicating petitioner, or the rewards given the inmates. (Tr. 2320-2339, 2344-2349, 2355-2373, 2383-2401). During this examination, there was running conflict between petitioner and the court on what could be introduced to prove entrapment. Finally, the court took over the inquiry. (Tr. 2402). Petitioner objected to the court's initiatives without avail. (Tr. 2402-2403). The court ordered Mayberry to be quiet and he responded: "My witness isn't being in an inquisition, you know. This isn't the Spanish Inquisition." (Tr. 2403). The court prohibited any further questions "along those lines." (Tr. 2404). Petitioner asked several other questions going to his theory of entrapment, which were ruled out of order. (Tr. 2404-2408). The court told petitioner to "ask proper questions" or "we are going to call it quits with this witness." (Tr. 2408-2409).

Petitioner replied that he was trying to ask proper questions and asked the court what he considered proper? The trial judge opened the following exchange (Tr. 2409-2410):

> "THE COURT: I am not here to educate you, Mr. Mayberry.
>
> "MR. MAYBERRY: No. I know you are not. But your're not here to railroad me into no life bit, either.
>
> * * *
>
> "THE COURT: Do you have any other questions to ask the witness?
>
> "MR. MAYBERRY: You need to have some kind of psychiatric treatment, I think. You're some kind of a nut. I know you're trying to do a good job for that Warden Maroney back there, but let's keep it looking decent anyway, you know. Don't make it so obvious, Your Honor.
>
> "THE COURT: Do you have any further questions to ask this witness?"

The summary contempt charge coupled together both exchanges into a single contempt. "On December 2, 1966, you referred to the Court as a 'Sullivan' and to the district attorney as a 'Gilbert.' You have accused the trial Court of conducting a 'Spanish Inquisition,' of railroading you, by the Court, to 'a life bit,' of being a nut, and 'in need of psychiatric treatment,' of 'doing a good job for Warden Maroney there,' and of stating, 'but let's keep it looking decent, anyway, you know. Don't make it so obvious, Your Honor.'" (Tr. 3223). For this contempt, the trial court imposed a sentence of one to two years. (Tr. 3224).

EIGHTH CHARGE

During the morning of the seventeenth day of trial, petitioner was examining co-defendant Codispoti. After a morning recess, co-defendant Langnes tried to stop the trial on the basis of recent inflammatory articles in the news-

papers. (The jury was not sequestered.) The court ordered him to be quiet. Langnes disobeyed and the court had him removed from the courtroom. (Tr. 2498-2499). A short while later, Langnes was escorted back into the courtroom, and he immediately began his protests about the newspapers. (Tr. 2503). The trial judge asked whether there was a gag in the court. (Tr. 2504). There was an off record discussion, and it does not appear what, if anything, was done to Langnes during that time. Thereupon petitioner moved for a severance. The motion was denied, the judge saying: "I have heard that before. It is denied again. Let's go on." Petitioner said: "This is the craziest trial I have ever seen." (Tr. 2504).

At the end of his examination of Codispoti, still on the seventeenth trial day, petitioner called as witnesses a series of persons whom the court had refused to subpoena. (Tr. 2582-2591). Petitioner tried to get the court to rule as to each witness. The court asserted that he had previously approved the list of witnesses that petitioner could call and they were the only witnesses petitioner would be permitted to call. (Tr. 2589). In the course of the colloquy, the court told petitioner that he was commiting a contempt of court by calling witnesses not on the list of those subpoenaed. (Tr. 2591). Petitioner later said: "Before I get to that [calling witnesses whom the court had indicated were available] I wish to have a ruling, and I don't care if it is contempt or whatever you want to call it, but I want a ruling for the record that I am being denied these witnesses that I asked for months before this trial ever began." (Tr. 2592).

The court's description of the eighth contempt is: "On December 5, 1966, you referred to the conduct of the trial 'as the craziest trial I have ever seen.' You have refused to abide by the rulings of the court in stating, 'I don't care if it is contempt or not, but I want a ruling that I am being denied the witnesses I asked for months before the trial began.' For this contempt of court you are sentenced to [pri-

son] for a period of not less than one year nor more than two years, to take effect upon the expiration of the sentence previously imposed." (Tr. 3224).[1]

NINTH CHARGE

On the eighteenth day of trial, petitioner was examining James F. Maroney. Shortly before the noon recess (Tr. 2695), the court and petitioner engaged in a colloquy concerning the further testimony of the witness and its relevance to petitioner's previous offer of proof. The court indicated his belief that petitioner had exhausted the matters that he intended to prove by this witness. (Tr. 2682-2683). Petitioner indicated a further line of inquiry, which the court said was not within the offer. (Tr. 2683). When petitioner disagreed, the court said: "I have ruled on that, Mr. Mayberry. Now proceed with your questioning, and don't argue." Petitioner responded: "You're arguing. I'm not arguing, not arguing with fools." (Tr. 2683).

In the summary contempt, the trial judge imposed a one to two year sentence, consecutive with previous sentences, for this brief verbal exchange which he restated: "On December 6, 1966, you have made reference to the Court as a 'fool.'" (Tr. 3225).

TENTH CHARGE

The last two contempt charges levelled by the trial court, unlike the preceding nine, did not relate to language that offended the court. The tenth charge is put this way: "On December 7, 1966, you have created a despicable scene in

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[1]The trial court also cited additional conduct of petitioner on December 5, which the court characterized as referring to the court in a scurrilous manner. (Tr. 2610-2611). However, the court did not include that in his description of the contempt and stated as to this behavior: "I am not making a separate sentence for that." (Tr. 3224-3225)

refusing to continue calling your witnesses and in creating such consternation and uproar as to cause a termination of the trial." (Tr. 3225).

The date referred to is the nineteenth day of the trial. The day began with the petitioner testifying in his own case. (Tr. 2793). At the conclusion of his testimony, he called Manuel Madronal to the stand. (Tr. 2868). This witness was still testifying when the court adjourned for dinner (Tr. 2948), and was still on the stand when court adjourned after an evening session at 9:45 p.m. (Tr. 3030).

Just before the dinner recess, when petitioner persisted in asking the witness about hatred between a guard and petitioner, the court ordered him to cease his examination. (Tr. 2940). Petitioner failed to comply with the court's ruling and he was quickly removed from the courtroom. (Tr. 2941). Petitioner was allowed to return after the dinner recess (Tr. 2948), but was promptly removed again when he tried to examine the witness. (Tr. 2950). After a 9:10 p.m. recess, petitioner was again present. (Tr. 3017). Still demanding the right to finish examination of the witness, petitioner was ejected for the third and last time that day. (Tr. 3021). All of the interruptions were brief. The trial did not terminate, even for that day, when petitioner was removed.

There is some possibility that the court did not intend to rest the tenth charge on the events of December 7. Petitioner was also ejected from the courtroom several times the next day, December 8. (Tr. 3041, 3046, 3062, 3070, 3077). No contempt charge was made in reference to this date. That day, the twentieth trial day, began with a series of defense motions based upon a letter concerning the trial the prosecutor had written to a local newspaper, which printed it. (Tr. 3033-3034). As a result of this and other defense protest, the court ruled that the petitioner would be allowed to present no further evidence. (Tr. 3041). His continuing vocal protests to the involuntary termination of his case led to the further expulsions. (Tr. 3045-3046,

3060-3062). Petitioner began his closing argument to the jury. (Tr. 3065-3066). The court permitted him only one hour to sum up. The last two expulsions were produced by his effort to finish his argument to the jury. (Tr. 3070, 3077). These incidents do not fit the court's tenth charge any better than those of December 7.

ELEVENTH CHARGE

The last contempt charge is related to the events of December 9, 1966, the twenty-first trial day. All summations had been finished the preceding day, and the court was prepared to charge the jury. (Tr. 3090). Petitioner announced that he would not remain silent and that he would object to having been forced to terminate his defense. (Tr. 3089-3090). Petitioner, though gagged, continued to speak. (Tr. 3092, 3093). The court thereupon had petitioner and Codispoti, who also insisted on speaking, removed to another room where a loudspeaker carried the jury charge to them. (Tr. 3094a-3094b).

These events are described in the summary contempt finding as follows: "On December 9, 1966, you have constantly, boisterously, and insolently interrupted the Court during its attempts to charge the jury, thereby creating an atmosphere of utter confusion and chaos. For this contempt of court it is the sentence of this court that you be confined in [prison] for a period of not less than one year nor more than two years, this sentence to take effect upon the expiration of the previous sentence imposed." (Tr. 3225-3226).

The trial court thus completed the series of eleven sentences which, in the aggregate, imposed upon petitioner a sentence of confinement of not less than eleven years nor more than twenty-two years for contempt of court. These sentences, as indicated above, were imposed on December 12, 1966. (Tr. 3216). Having pronounced what appears to be the longest prison sentence for contempt of court in the

annals of Anglo-American law, the court turned to the sentences for the charges of prison breach and holding hostage. Petitioner, at that point, tried to speak to the court "concerning the contempt proceedings." (Tr. 3226). The court, declining to entertain any statements, imposed sentences aggregating a minimum of twenty years and a maximum of forty years on the substantive crimes, and ordered petitioner removed from the courtroom. (Tr. 3226-3227).

On appeal of the criminal contempt conviction to the Supreme Court of Pennsylvania, that court affirmed. 434 Pa. 478, 255 A.2d 131 (1969). Justice Jones wrote an opinion in which one other justice joined. Justices Roberts, Cohen and Egan concurred in the result. Justice O'Brien dissented.

SUMMARY OF ARGUMENT

IA. Petitioner's conviction in a summary proceeding of serious charges of criminal contempt and his sentence of 11 to 22 years violate the Constitution's guarantees of due process of law. No hearing was held. The defendant was given no notice of the charges and no opportunity to present evidence or argument by way of defense or mitigation. Since *Bloom v. Illinois*, 391 U.S. 194 (1968), it is established that petitioner's conviction is for a crime in the ordinary sense. The denial of due process of law in such a proceeding cannot be justified by considerations of efficiency or the desirability of vindication of the authority of a court. "Genuine respect, which alone can lend true dignity to our judicial establishment, will be engendered, not by fear of unlimited authority, but by the firm administration of the law through those institutionalized procedures which have been worked out over the centuries." *Id.* at 208. More basic even than the right to a jury trial, upheld in *Bloom*, is the right to a trial at all.

This contention in no way detracts from the powers of trial courts to quell disturbances and insure that dignity, order and decorum are preserved. *Illinois v. Allen*, 397 U.S.

337 (1970), decided by this Court last Term, outlines the varied sanctions available to a trial judge to use mid-trial. Significantly not included is the power to convict and sentence the contemnor to a prison term, certainly not to inflict the punishments that apply to serious offenses.

B. Even if petitioner was not constitutionally entitled to a nonsummary trial on the issue of guilt, he was at least entitled to a hearing on the question of sentence. The trial court denied to petitioner even the ancient right of allocution, to speak in mitigation before the pronouncement of sentence. Petitioner had the right to try to reduce or blunt the fury that manifested itself in the court's excoriation of the contemnor and the unprecedented sentence. Through his own efforts or through counsel or by the testimony of witnesses, he should have been allowed to bring to the court's attention any mitigating or extenuating factors, including the nature of the defendants and the conditions and circumstances that provoked the conduct condemned by the court with such ferocity.

II. Petitioner was convicted of a serious criminal charge without the benefit of counsel and without having effectively waived counsel. Even in the most summary contempt prosecution, the charged contemnor has a constitutional right to counsel. That right was denied in this case. Nor can it be said that petitioner waived his right to counsel. The decision made to represent himself in the trial of the felony charges, during which the alleged contempts occurred, does not operate as a waiver of counsel in the separate and later prosecution for serious contempt charges.

III. In the circumstances of this case, petitioner was entitled to have his criminal contempt charges heard by a judge other than the judge who presided over the felony trial. The contempts charged included a continuing personal confrontation with the judge. There is substantial evidence that this confrontation affected the impartiality of the court. Not the least of these indications is the sentence imposed.

In any event, the potential for bias was clearly present. Where a judge has been subjected to personal criticisms and insults that strike at the most vulnerable and human qualities of a judge's temperament, he should be disqualified to preside in a contempt prosecution. *Offutt v. United States*, 348 U.S. 11 (1954); *In re Murchison*, 349 U.S. 133 (1955); *Bloom v. Illinois, supra* at 202. It is unsound to ask the trial judge in such cases to determine whether his reactions have reached the point where he can no longer act as an unbiased arbiter. Appellate courts should not be forced to try to feel the heat of a courtroom from a cold record. Most important of all, it is vital that the courts not only provide, but appear to provide justice.

IV. The Pennsylvania criminal contempt statute, as applied to petitioner, is unconstitutionally vague. The statute specifically restricts the powers of the courts to convict of contempts for courtroom misbehavior only if the result is the "obstructing of the administration of justice." Act of June 16, 1836, P.L. 784, § 23; Pa. Stat. Ann. tit. 17, § 2041 (1962). Application of this statute to permit summary punishment for insulting and disrespectful language that does not hinder or impede the progress of a trial does such violence to the language as to deprive it of the necessary quality of fair notice to persons governed thereby. *Lanzetta v. New Jersey*, 306 U.S. 451(1939).

V. The 11 to 22 year sentence imposed upon petitioner for contumacious courtroom behavior constitutes cruel and unusual punishment. It is a sentence unprecedented in Anglo-American history. In 1821, this Court stated that there are "known and acknowledged limits of fine and imprisonment" for criminal contempts. *Anderson v. Dunn*, 6 Wheat. 204, 228 (1821). In that same case, this Court affirmed the principle that the punishing power for contempts should be "the least power adequate to the end proposed." *Id.* at 231. In recent years, the severity of punishments for contempt violations has escalated. However, there is nothing comparable to the sentence in this case.

More than half of the States, unlike Pennsylvania, have placed legislative maxima on criminal contempt punishments; the longest of these is six months, and they range downward to three days and 30 hours in Texas and Kentucky respectively. A survey of the reported appellate decisions across the country for the past twenty years discloses only five cases in which the trial court had imposed a contempt sentence for in-court misbehavior in excess of six months; three of those were reversed by appellate courts. The 22 year sentence imposed upon petitioner is greater than the sentence that can be imposed in Pennsylvania for murder in the second degree. The sentence is so far out of line with legislative and judicial actions in comparable matters as to constitute cruel and unusual punishment. *Weems v. United States*, 217 U.S. 349 (1910); *Trop v. Dulles*, 356 U.S. 86 (1958).

ARGUMENT

I

IN A SERIOUS CRIMINAL CONTEMPT CASE, FOUNDED UPON ALLEGED MISBEHAVIOR IN THE PRESENCE OF THE COURT THEREBY OBSTRUCTING THE ADMINISTRATION OF JUSTICE, AND PROSECUTED AT THE CONCLUSION OF THE PROCEEDING IN WHICH THE CHARGED CONTEMPTS OCCURRED, THE DEFENDANT IS ENTITLED TO THE BASIC REQUISITES OF DUE PROCESS OF LAW: NOTICE OF THE CHARGES AND THE OPPORTUNITY TO BE HEARD IN DEFENSE OR MITIGATION.

A. Petitioner Was Entitled to a Nonsummary Court Trial.

Petitioner was summarily convicted of eleven charges of criminal contempt and sentenced to prison for a minimum of 11 years and a maximum of 22 years. There was no process beyond the trial court's pronouncement of guilt and sentence. Petitioner was never given notice of the charges against him. Petitioner was denied the right to file motions and pleadings to present claims and raise relevant issues, in-

cluding possible challenge for bias of the trial judge in the contempt prosecution. No evidence was adduced against him, and he was deprived of the rights to confront and cross-examine witnesses. He had no opportunity to call witnesses in his own behalf. The right of allocution, to speak in mitigation before sentence was pronounced, was abridged. In sum, petitioner was deprived of all the basic procedures embodied in the concept of Due Process of Law, as guaranteed by the Fourteenth Amendment to the Constitution. Such a conviction cannot be allowed to stand.

This case presents the newest chapter in the long struggle to resolve the tension between the Constitution and the law of criminal contempt. The Constitution, in the Bill of Rights, declares that no person shall be compelled to submit to autocratic and despotic power wielded by any government official, including members of the judiciary. The law of criminal contempt, on the other hand, has traditionally maintained that it is necessary for trial judges to have precisely such power. So long as the judges used that unbridled power with extreme restraint, particularly in the sanctions imposed upon contemnors, the clash with constitutional principle could be muted. Events of the past quarter of a century have seen the steady disappearance of the judicial restraint that had theretofore marked the exercise of the contempt power. Harsher and harsher sentences have been pronounced in various types of contempt prosecutions. At the same time, this Court has moved forthrightly to declare that the Constitution does govern criminal contempt law as applied by today's judges.

Two years ago this Court declared for the first time that criminal contempts are crimes. *Bloom v. Illinois*, 391 U.S. 194 (1968). Mr. Justice White, for a majority of seven Justices, wrote the opinion of the Court, which fundamentally altered the relationship between the Constitution and the law of criminal contempt:

> "Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong

which is punishable by fine or imprisonment or both. In the words of Mr. Justice Holmes:

> 'These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech.' *Gompers v. United States*, 233 U.S. 604, 610 (1914).

Criminally contemptuous conduct may violate other provisions of the criminal law; but even when this is not the case convictions for criminal contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same. Indeed, the role of criminal contempt and that of many ordinary criminal laws seem identical-protection of the institution of our government and enforcement of their mandates." *Id.* at 201.

More basic even than the right to a *jury* trial, upheld in *Bloom*, is the right to a trial at all. It is inherent in this Court's decision in *Bloom* that there is a constitutional right to a hearing of some kind in a trial to a court.[2] That hearing, at its absolute minimum, is defined by the bedrock concepts of Due Process of Law.

This Court's rationale in *Bloom* goes well beyond the particular right of the trial by jury. The Court explicitly rejected history and "immemorial usage" as a necessary or sufficient basis either to uphold the existing procedures or to jettison them. "We do not find the history of criminal contempt sufficiently simple or unambiguous to rest rejection of our prior decisions entirely on historical grounds.... In any event, the ultimate question is not whether the traditional doctrine is historically correct but whether the rule that criminal contempts are never entitled to a jury trial is a nec-

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[2]Petitioner was not entitled to a jury trial by virtue of this Court's decision in *DeStefano v. Woods*, 392 U.S. 631 (1968). It does not follow, of course, that petitioner was not entitled to a full trial to a judge sitting without a jury.

essary or an acceptable construction of the Constitution." 391 U.S. at 198-200 n. 2. The Court frontally entertained and upheld "challenges to a constitutional principle which is firmly entrenched and which has behind it weighty and ancient authority." *Id.* at 197-198.

The analysis recited the manifold apprehensions of potential abuse of the contempt power, as reflected in both legislative acts and judicial opinions. Mr. Justice White's opinion summed up the experience:

> "This course of events demonstrates the unwisdom of vesting the judiciary with completely untrammeled power to punish contempt, and makes clear the need for effective safeguards against that power's abuse. Prosecutions for contempt play a significant role in the proper functioning of our judicial system; but despite the important values which the contempt power protests, courts and legislatures have gradually eroded the power of judges to try contempts of their own authority. In modern times, procedures in criminal contempt cases have come to mirror those used in ordinary criminal cases. Our experience teaches that convictions for criminal contempt not infrequently resulting in extremely serious penalties, see *United States v. Barnett*, 376 U.S. 681, 751 (Goldberg, J., dissenting), are indistinguishable from those obtained under ordinary criminal laws." 391 U.S. at 207-208.

The decisions cited by Mr. Justice Goldberg are almost beyond comparison in harshness to the sentence imposed upon petitioner. The longest sentences mentioned were the three years of confinement imposed in *Green v. United States*, 356 U.S. 165 (1958), and in *Collins v. United States*, 269 F.2d 745 (9th Cir. 1959). The other punishments included by Mr. Justice Goldberg to show dramatic increase in severity were 18 months, 15 months, a year and one day, and one year. There is more than a difference in degree between these sentences and the confinement to a minimum of 11 years and a maximum of 22 years imposed upon peti-

tioner. It exceeds by more than seven times the harshest sentence referred to in a collection of harsh sentences.

This Court, in *Bloom*, considered and rejected the contention that considerations of efficiency or the desirability of vindicating the authority of the court justify summary trial of serious criminal contempt charges.

> "We cannot say that the need to further respect for judges and courts is entitled to more consideration than the interest of the individual not to be subjected to serious criminal punishment without the benefit of the procedural protections worked out carefully over the years and deemed fundamental to our system of justice. Genuine respect, which alone can lend true dignity to our judicial establishment, will be engendered, not by the fear of unlimited authority, but by the firm administration of the law through those institutionalized procedures which have been worked out over the centuries." 391 U.S. at 208.

This Court specifically alluded to the question of contempts that might be committed in the actual presence of the court. The contempt charge in *Bloom* was not of that nature. The Court, believing that special mention of courtroom contempt procedure was warranted, declared its conviction that there is no need "to make exception . . . for disorders in the courtroom." 391 U.S. at 210.

The determination to require use of ordinary procedural protections, "those institutional procedures which have been worked out over the centuries," in serious criminal contempt prosecutions is wholly consistent with the trend of decisions by this Court in recent times. This was the eventual outcome of the uncertainty over the appropriate procedure to employ when a witness refuses without justification to testify before a grand jury. *Harris v. United States*, 359 U.S. 19 (1959).

This Court made it clear in 1963 that, where there is doubt as to a contemnor's criminal intent and where evi-

dence outside the record would bear on that issue, a summary conviction could not be permitted. *Panico v. United States*, 375 U.S. 29 (1963). In *Ungar v. Sarafite*, 376 U.S. 575 (1964), this Court upheld a 10-day prison sentence imposed by a State court on a witness found guilty of in-court contempt. The opinion of the Court specially noted that there was no procedural question presented by the manner of the defendant's contempt trial:

> "We do not and need not, however, deal with the circumstances in which a trial judge may or may not constitutionally resort to summary proceedings after trial. For in this instance, assuming a nonsummary hearing was required, the hearing afforded petitioner satisifed the requirements of due process." *Id.* at 589.

The opinion continues, in footnote, to outline briefly the due process requirements complied with in the State prosecution:

> "These requirements include the right to be adequately advised of the charges, a reasonable opportunity to meet the charges by way of defense or mitigation, representation by counsel, and an adequate opportunity to call witnesses." *Id.* at 589 n. 9.

The Court also discussed the due process requirements recently in *Holt v. Virginia*, 381 U.S. 131 (1965), which reversed a State summary conviction for contempt involving a contempt defendant and his attorney on the ground that the attack upon the judge was part of a legitimate defense motion to disqualify the judge in the contempt case. The opinion of the Court declares the necessary manner of trying contempt cases consistently with the Constitution:

> "And it is settled that due process and the Sixth Amendment guarantee a defendant charged with contempt such as this 'an opportunity to be heard in his defense—a right to his day in court—. . . and to be represented by counsel.' *In re Oliver*, 333 U.S. 257, 273. . . . The right to be heard must necessarily embody a right to file motions and pleadings essen-

> tial to present claims and raise relevant issues." *Id.* at 136.

The pattern of decisions of this Court makes it clear, almost beyond argument, that nonsummary procedures are constitutionally required in serious criminal contempt prosecutions. The line between "serious" and "petty" prosecutions was drawn at six months for purposes of the right to trial by jury. *Bloom v. Illinois, supra; Cheff v. Schnackenberg*, 384 U.S. 373 (1966). In so doing, this Court applied the analogous standard of the right to jury trial in ordinary criminal prosecutions. There is no analogy in ordinary criminal law that permits dispensing with rudimentary due process in any form of prosecution. There is a suggestion that the six month period might govern, however, in this Court's special discussion in *Bloom* of the problem of courtroom contempts committed in the presence of the trial judges. 391 U.S. at 210.[3] *Cf. Fisher v. Pace*, 336 U.S. 155 (1949). Even if the six month period were invoked to draw the outer limit of summary criminal contempt, petitioner's conviction is constitutionally infirm.

The contention made here relates to criminal contempt prosecutions tried, as was petitioner, at the conclusion of the proceeding in which the alleged contempts occurred. Nothing here detracts from the powers of trial courts to quell disturbances and to insure that dignity, order and decorum are preserved. In *Illinois v. Allen*, 397 U.S. 337 (1970), decided last Term, this Court addressed itself to the sanctions that are available to the courts in dealing with unruly defendants:

> "We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag

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[3]Six month sentences were upheld in *Sacher v. United States*, 343 U.S. 1 (1952); *Ex parte Terry*, 128 U.S. 289 (1888). These appear to be the largest sentences this Court has ever allowed to stand in prosecution for in-court contempts.

> him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly." *Id.* at 343-344.

The opinion makes clear that citation for contempt is not summary conviction; there would follow a subsequent trial of the contempt charges, at which the court might still face a still unruly defendant. *Id.* at 345. The third category, removal from the courtroom, could permit the trial to continue in the defendant's absence, as occurred in Allen's case. Or, as this Court noted, the trial judge could ". . . imprison an unruly defendant such as Allen for civil contempt and discontinue the trial until such time as the defendant promises to behave himself." *Id.* at 345. There are thus several remedies available to the judge faced with the defendant bent upon disrupting the trial.

Significantly, nothing in the opinion of the unanimous Court in *Allen* suggests the need or propriety for summary conviction of criminal contempts that might occur in the presence of the court. *Cf. Fisher v. Pace*, 336 U.S. 132 (1949).

It is submitted that petitioner's summary criminal contempt conviction, at the conclusion of the proceedings in which the alleged contempts occurred, on charges serious enough in the mind of the presiding judge to warrant sentences aggregating 11 to 22 years, violates the Due Process Clause of the Fourteenth Amendment.

B. Petitioner Was Entitled at Least to a Hearing on Sentence.

Even if this Court should not accept the contention that petitioner was entitled to a nonsummary trial on guilt, albeit without a jury, petitioner was at least entitled to a hearing on the question of sentence. The ancient right of allocution, to speak in mitigation before the pronouncement of sentence, is a fundamental right. The trial judge here

chose to impose upon petitioner a wholly unprecedented sentence of incomparable harshness. He did so by employing on each of 11 counts a sentence that ranks with the longest ever pronounced for in-court contempts. Thereupon, with unmatched stringency, the trial court directed that the 11 severe sentences be served consecutively. In a few minutes, the trial court sentenced petitioner to a total of 62 years in prison, of which 22 were for the criminal contempt convictions. In such a case, it needs no extended argument to show that there ought to have been a hearing on the question of sentence before punishment was fixed.

The enormity of the sentence speaks with clarity to the feeling of righteous anger that moved the court. His words underscore the pent up fury that was unleashed. At the outset of his jury charge, he advised the jury that they "have had the experience of witnessing a trial so utterly horrendous and disgusting in nature that certainly has never been equalled in the annals of this Commonwealth of Pennsylvania, and probably not even in the annals of any state in the union." (Tr. 3095). The excoriation of petitioner and his co-defendants continued the following Monday when they appeared for sentencing on the felony charges. Before sentencing, the trial court denounced them collectively:

> ". . . during the trial on charges of holding hostages and for prison breach you have conducted yourselves with such utter contempt of court and such outrageous defiance of and scorn for judicial proceedings that seems unequalled in judicial history. You have deliberately heaped ridicule upon orderly proceedings, and have by your words and actions knowingly intended to impair, taint, and undermine the respect and confidence of the public in our Criminal Courts.
>
> "You have by your contumacious conduct attempted to create a circus atmosphere and a sham of this trial. Your actions have created an atmosphere highly detrimental to the proper administration of justice.

"You have abused and ridiculed the trial proceedings, defied Court orders, addressed vulgar, scurrilous, and insulting language to the Court, and have wilfully baited the Court in your efforts to obtain a mistrial.

"Your actions have brought consternation to the adherence of justice under law and have brought joy and delight in the hearts of abettors bent on destruction of our very system of social order and administration.

"You have given false hope or aspiration to others to attempt to repeat your disgusting tactics. You have attempted to undermine the very structure of that institution in which you sought the protection of your rights as defendants, and have mistakenly construed the patience of the Court for license to heap your detestable abuse upon it.

"You have accused this Court of criminal conspiracy with prison officials to obstruct justice and of entering into a conspiracy with the news media to leak out unwarranted and improper information to poison the minds and inflame the jury. You have made unmitigated attacks on the trial Judge, threatening his life, and referring to him as a dirty S.O.B., a bum, a tyrant, an idiot, a creep, a punk, a fool, a dirty stumbling old dog, a nut, a Caesar, of being crazy, of conducting a Gilbert and Sullivan comic opera, and of infiltrating the courts with communist tactics.

"The Court has endured this day by day outrageous conduct and waited for the disposition of open rebellion and contempt only because of its concern for a fair and impartial trial, and of the impact the spot punishment might have on the jury.

"I want you and all others inclined towards such contumacy to know that the Court is charged with the duty of being the primary protector of its judicial dignity and conscience, and of its public standing as a judicial forum.

> "The time is ripe to protect the interest of the general public in the administration of justice, and to punish for direct contempt I shall impose punishment only for the more glaring acts of contempt.
>
> "Richard Mayberry, stand." (Tr. 3219-3221).

Quite possibly, nothing could have been offered by petitioner or by counsel that would have reduced or moderated the force that these words indicate. Nevertheless, we contend that petitioner had the right to try, through his own efforts or through the pleading of counsel or by witnesses, to show the sentencing court that the conduct did not justify such extremes of condemnation and punishment. The trial court took no cognizance of any mitigating or extenuating factors, including the nature of the defendants and the conditions and circumstances that provoked the conduct the court condemned with such ferocity.

This Court has held that due process safeguards, including the right to counsel, apply to a variety of sentencing proceedings. *E.g., Specht v. Patterson*, 386 U.S. 608 (1967); *Mempa v. Rhay*, 389 U.S. 128 (1967); *Chewning v. Cunningham*, 368 U.S. 443 (1962); *Reynolds v. Cochran*, 365 U.S. 525 (1961); *Moore v. Michigan*, 355 U.S. 155 (1957); *Chandler v. Fretag*, 348 U.S. 3 (1954); *Williams v. New York*, 337 U.S. 241 (1949) (dictum); *Townsend v. Burke*, 334 U.S. 736 (1948). The variations in factual circumstances, even in direct contempts, require that contemnors be afforded the opportunity to offer evidence or argument going to the degree of criminal intent and mitigation of penalty. See, *e.g., Panico v. United States*, 375 U.S. 29 (1963); *Hoffman v. United States*, 341 U.S. 479 (1951); *In re Oliver*, 333 U.S. 257 (1948); *Rollerson v. United States*, 343 F.2d 269 (D.C. Cir. 1964); *Widger v. United States*, 244 F.2d 103 (5th Cir. 1957); *Offutt v. United States*, 232 F.2d 69 (D.C. Cir.), cert. denied, 351 U.S. 988 (1956).

Judge Henry Friendly holds the opportunity of a contemnor to speak in mitigation of punishment as so fundamental that he would reverse a summary contempt conviction on

that ground, even though the matter had not been presented as a ground for appeal. He declared: ". . . I would reverse the conviction because of the judge's failure, of his own motion, to accord Mirra any opportunity to speak in explanation or extenuation, either in person or by counsel. In my view this was so fundamental a requirement that it is immaterial either that Mirra's counsel did not affirmatively seek such an opportunity or that the point was not urged before us." *United States v. Galante*, 298 F.2d 72, 76 (2d Cir. 1962) (concurring and dissenting opinion). Judge Friendly distinguished *Sacher v. United States*, 343 U.S. 1 (1952), on the ground that the presiding judge there had, of his own motion, permitted each defendant to address the court immediately after he had read the certificates and orders and "surely would have altered these if defendants' statements had proved persuasive." *Id.* at 79.

Even if it is permissible under the Constitution to deny petitioner any form of hearing on the merits of the contempt charges, it is submitted that there is a constitutional right, violated in this case, to a hearing on the sentence to be imposed.

II

PROSECUTION OF A SERIOUS CHARGE OF CRIMINAL CONTEMPT AGAINST AN UNREPRESENTED INDIGENT DEFENDANT, WHO HAD NOT WAIVED COUNSEL, VIOLATES THE RIGHT TO COUNSEL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS.

The prosecution of petitioner for criminal contempt, leading to his sentence to prison for 11 to 22 years, was a separate legal proceeding from the prosecution for prison breach and holding hostage in which the alleged contempts occurred. During the trial for the ordinary criminal charges, petitioner exercised his constitutional prerogative to serve as his own counsel. (Tr. 26-30, 205). During the prosecution for criminal contempt, petitioner was unrepresented by

counsel and never effectively waived his right to be represented by an attorney.

Unquestionably, the constitutional right to counsel provided by the Sixth and Fourteenth Amendments to the Constitution applies to criminal contempt prosecutions. This Court has so indicated on numerous occasions. *E.g.*, *In re Oliver*, 333 U.S. 257, 273 (1948); *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964); *Holt v. Virginia*, 381 U.S. 131, 136 (1965); *Bloom v. Illinois*, 391 U.S. 194, 205 (1968). The Court of Appeals for the Fifth Circuit has held that, even in cases of summary contempt, the accused must be afforded the opportunity to consult with counsel, and failure to provide this opportunity constitutes a denial of due process. *Johnson v. United States*, 344 F.2d 401 (5th Cir. 1965). A district court recently concluded that the right to counsel in summary contempt cases applies only to the serious contempts punishable by more than six months. *Nelson v. Holzman*, 300 F. Supp. 201, 203 (D. Ore. 1969). See also *United States* ex rel. *Robson v. Malone*, 412 F.2d 848, 850 (7th Cir. 1969); *Appeal of S.E.C.*, 226 F.2d 501, 520 (6th Cir. 1955); and see *In re Williams*, 152 S.E.2d 317 (N.C. Sup. Ct. 1967); *Cardona v. Perez*, 280 N.Y.S.2d 913 (App. Div., 1st Dep't 1967); *Spencer v. Dixon*, 248 La. 604, 181 So. 2d 41 (1965).

Petitioner's waiver of counsel in the prison breach-holding hostage trial did not operate as a continuing waiver of his constitutional right to counsel in the subsequent criminal contempt proceeding. Compare *Chandler v. Fretag*, 348 U.S. 3 (1954). In *Chandler*, this Court held that a waiver of counsel in an ordinary prosecution did not extend to trial of an habitual offender charge, even though they may be conducted in a single proceeding. The criminal contempt prosecution is more clearly independent of the felony charge than an habitual offender prosecution. No waiver of counsel in the contempt case can be inferred from the previous waiver in the felony trial, which occurred, of course, before any possibility of the contempt prosecutions even arose.

It follows, therefore, that petitioner's conviction and sentence for criminal contempt are invlaid because obtained in violation of the defendant's constitutional right to counsel.

III

IN THE CIRCUMSTANCES OF THIS CASE PETITIONER WAS ENTITLED TO HAVE HIS CRIMINAL CONTEMPT CHARGES HEARD BY A JUDGE OTHER THAN THE JUDGE WHO PRESIDED OVER THE TRIAL OUT OF WHICH THOSE CHARGES AROSE.

The potential for bias created where contempt charges arise out of a continuing personal confrontation between the trial judge and a defendant is obvious. A judge who feels himself subject to personal attack by a litigant before him cannot, consistent with due process, preside over a subsequent criminal contempt prosecution, at least where there is no necessity for immediate adjudication. No such justifying necessity was present in this case inasmuch as the trial court in fact took no action to cite, convict or sentence petitioner for contempt until the verdict had been returned and the trial concluded. At this point, the court's action could not be justified as a necessary means of keeping order and enabling the trial to proceed.

The disqualification of a trial judge who has been subjected to personal criticism, where there is no necessity for instant action, is supported by a series of decisions in this Court. The rule's origin lies in the statement in *Cooke v. United States*, 267 U.S. 517, 539 (1925), that:

> "Where the contempt charged has in it the element of personal criticism or attack upon the judge . . . [then another judge should be called upon to adjudicate the contempt] where conditions do not make it impracticable, or where the delay may not injure public or private right."

Sacher v. United States, 343 U.S. 1 (1952), upheld a trial judge's delayed adjudication of in-court contempt, but on grounds distinguishable from this case. The opinion of the Court is addressed mainly to the propriety of summary conviction of contemnors. Upholding the power of a trial judge to use the contempt power in the course of the trial, the Court concluded that the trial judge should be permitted to do, at the end of the trial, what he could have done mid-trial. Since all but one of the defendants in *Sacher* were counsel for defendants, the Court noted the persuasive reasons to defer mid-trial sanctions against lawyers which might redound to the prejudice of their clients.

The decision of this Court last Term in *Illinois v. Allen*, 397 U.S. 337 (1970), rejects the premise of *Sacher* concerning the extent of the *criminal* contempt power that a trial court can exercise summarily mid-trial. This Court specifically did not include punishment for criminal contempt as one of the sanctions available to the trial judge to impose without a hearing. Indeed, the Court's opinion makes clear that such punishment, if warranted, will follow a trial of the contempt charges. The syllogism of *Sacher* has thus been broken at its major premise.

Even before the decision in *Allen*, the viability of *Sacher* has been in doubt, as a result of decisions by this Court. Thus, *Offutt v. United States*, 348 U.S. 11 (1954), reversed a conviction in which the trial judge had summarily found defense counsel in contempt at the close of trial. This Court held that, where the alleged contempt involved a clash between the trial court and the contemnors, it should have been heard by another judge. While the opinion specifically refused to "retrace the ground so recently covered in the *Sacher* case" (*id.* at 13), and relied upon the judge's apparent personal embroilment with the contemnors, it has been interpreted as indicative of a shift of position by the Court. See, *e.g.*, Anno., 99 L. Ed. 19 (1955); Anno., 3 L. Ed. 2d 1855 (1959); Note, *Procedures for Trying Contempts in the Federal Courts*, 73 Harv. L. Rev. 353, 362-363 (1959).

In *In re Murchison*, 349 U.S. 133 (1955), this Court made it clear that actual involvement by the judge need not be demonstrated to require his disqualification. The fact that he had played a role creating the potential for bias was enough. A judge who had acted as a one-man grand jury could not subsequently judge contempt charges arising out of the grand jury proceeding because the judge's role as the grand jury created a potential for bias inconsistent with the constitutional requirement of an impartial tribunal.

The standard for disqualification was restated in *Ungar v. Sarafite*, 376 U.S. 575 (1964). The distinction was noted between "disobedience to court orders and criticisms of its rulings during the course of the trial" and "criticisms of judicial conduct which are so personal and so probably productive of bias that the judge must disqualify himself to avoid being the judge in his own case." *Id.* at 584. This Court determined that the contempts in *Ungar* did not involve "an insulting attack upon the integrity of the judge carrying such potential for bias as to require disqualification." *Ibid.*

Nine of the eleven contempt charges levelled agianst petitioner by the trial court involved epithets directed to the judge personally, or were taken by the judge as personal aspersions. Words like "dirty sonofabitch," "dirty tyrannical old dog," "stumbling dog," and "fool" were directed at the judge. His conduct of the trial was variously characterized: analogies were made to Gilbert and Sullivan, and to the Spanish Inquisition, and the proceeding was described as "the craziest trial I have ever seen." The judge was told to "Go to hell" and "Keep your mouth shut." Accusations that the trial court was participating in a conspiracy to railroad the defendants and to force the defendants to be prejudiced were made. As this Court noted, such conduct "often strikes at the most vulnerable and human qualities of the judge's temperament." *Bloom v. Illinois*, 391 U.S. 194, 202 (1968).

The trial court's reactions to these events are plainly disclosed. Most significant, surely, is the unprecedented

severity of the sentences he imposed, aggregating 11 to 22 years. His language excoriating the defendants collectively is dramatic evidence of the extent to which he felt personally wounded by the verbal assaults. See pp. 32-34 *supra*.

Even if there were no such surface evidence of the court's personal reactions, the potential for such reactions is too strong to permit the same judge who was the target for the epithets to sit in judgment of the alleged contemnor. It is unsound to ask such a trial judge to determine whether he has reached the point that he can no longer act as an unbiased arbiter. F. R. Crim. P. 42(b) does not permit a federal court to be forced into such an awkward calculation; it has been said that the rule was "prompted by the common experience that uncommonly prejudiced individuals almost invariably consider themselves impartial. . . ." Anno., 3 A.L.R. Fed. 420, 422 (1970).

Further, a rule that does not turn on the probability of prejudice places appellate courts in the extremely uncongenial position of attempting to determine from a cold transcript the degree of heat that was reflected in the trial court's actions.

Perhaps most important, to avoid the suspicion that might be cast upon the integrity of the judicial system in such cases, it is vital that the courts not only provide, but appear to provide justice.

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. . . . But to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt v. United States*, 348 U.S. 11, 14." *In re Murchison*, 349 U.S. 133, 136 (1955).

The nature of the contempts charged in this case, and the absence of any overriding necessity, lead to the conclusion that the trial court committed constitutional error in not disqualifying himself from presiding in the contempt proceeding.

IV

THE PENNSYLVANIA CRIMINAL CONTEMPT STATUTE, AS APPLIED TO PETITIONER, IS UNCONSTITUTIONALLY VAGUE.

Petitioner was convicted under a Pennsylvania statute which provides:

> "The power of the several courts of this commonwealth to issue attachments and to inflict summary punishments for contempt of court shall be restricted to the following cases, to wit:
>
> "I. To the official misconduct of the officers of such courts respectively.
>
> "II. To disobedience or neglect by officers, parties, jurors or witnesses of or to the lawful process of the court.
>
> "III. To the misbehaviour of any person in the presence of the court, thereby obstructing the administration of justice." Act of June 16, 1836, P.L. 784, § 23, Pa. Stat. Ann. tit. 17, § 2041 (1962).

The specific provision under which petitioner was convicted is III, misbehavior in the presence of the court thereby obstructing the administration of justice.

Application of this statute to petitioner's conduct, at least with respect to the first nine charges, does such violence to the language of the act as to render it unconstitutionally vague. The statute, as written, does not proscribe all misbehavior in the presence of the court. It makes criminal, as a contempt, only such misbehavior that thereby obstructs the administration of justice. Misbehavior that does not

produce the result of obstructing the administration of justice is outside the clearly stated ambit of the wrongful conduct.

Webster's Third New International Dictionary of the English Language defines "obstruct" to mean:

> "1: to block up: stop up or close up: place an obstacle in or fill with obstacles or impediments to passing . . . 2: to be or come in the way of: hinder from passing action or operation . . . 3: to cut off from sight: shut out."

"Obstructing" is not a concept that would be difficult for an ordinary person to understand. It does not appear to be ambiguous. In connection with legal proceedings, men of common intelligence would expect that "obstructing the administration of justice" would mean hindering or impeding or blocking the conduct of a trial.

On the other hand, it would be a shock to the average person to learn that "obstructing" can be equated with showing disrespect to a court, or using language that some would say is merely insolent or insulting to a court's dignity. To force such concepts into the meaning of "obstructing" is to rob the word of intelligibility and to render it, as part of a penal statute, unconstitutionally vague.

Due process requires that citizens be given reasonable warning of the conduct which a legislature acts to define as criminal. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). While the paradigm of a vague statute is one in which terms used are patently indefinite, considerations of fair notice become even stronger when statutory words of reasonable certainty are stretched and distorted beyond ordinary recognition.

The argument advanced here is not that the Commonwealth of Pennsylvania would violate the Constitution if it

were to define contempt in a way to include disrespectful and insolent conduct that does not obstruct the course of judicial proceedings. Some State legislatures have indeed declared that misbehavior of this form is criminal contempt. See, for example, the Virginia statute quoted in *Holt v. Virginia*, 381 U.S. 131, 135 n. 1 (1965), where contempt includes, in addition to misbehavior in the presence of the court or so near thereto as to obstruct or interrupt the administration of justice, the following:

> "(3) Vile, contemptuous or insulting language addressed to or published of a judge for or in respect of any act or proceeding had, or to be had, in such court, or like language used in his presence and intended for his hearing for or in respect of such act or proceeding."[4] Va. Code Ann. § 18.1-292 (1960).

The New York statute, which underlay the prosecution upheld in *Ungar v. Sarafite*, 376 U.S. 575 (1964), defines criminal contempt as:

> "1. Disorderly, contenptuous, or *insolent behavior*, committed during [the court's] sitting, in its immediate view and presence, and *directly tending* to interrupt its proceedings, *or to impair the respect due to its authority*. . . ." *Id.* at 580; N.Y. Judiciary Law, § 750A (1965) (Emphasis added).

Sixteen States have similar provisions, based on this statute.[5]

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[4]This Court passed without decision a contention in *Holt* that the summary convictions were invalid because the alleged misconduct "did not disturb the court's business or threaten the demoralization of its authority." 381 U.S. at 135 n. 2

[5]Twelve States define contemptuous conduct in substantially the same language as the quoted NewYork provision:

Alaska: Alaska Stat. Sec. 09.50.010 (1962)
Arizona: Ariz. Rev. Stat. Ann. § 13-341 (1956)
Arkansas: Ark. Stat. Ann. 34-901 (1962)
California: West's Ann. Cal Penal Code § 166 (1970)
Iowa: Iowa Code § 665.2 (950)
Michigan: Mich. Stat. Ann. 27A.1701 (1962)

The Pennsylvania statute on its face is plainly not of this breadth. Nor have prior interpretations of the act since 1836 given it a settled meaning beyond that signified by its language. It appears that this case is the first case in which the Supreme Court of Pennsylvania has upheld a contempt conviction for conduct not obstructive of the administration of justice. *Cf. In re McDonald*, 110 Pa. Super. 352, 168 Atl. 521 (1933). It would be manifestly improper to permit such an interpretation, whatever its effect for future cases, to be given retroactive application. See Freund, *The Supreme Court and Civil Liberties*, 4 Vand. L. Rev. 533, 540-541 (1951).

The first nine charges of contempt against petitioner involve verbal epithets and allegations of misconduct by the trial court. None of these had any discernible effect upon the continuation in course of the trial. The specific conduct which the trial court cited as petitioner's contempts cannot be fairly described as "obstructing the administration of justice." The cited incidents were brief, some literally momentary in duration. At least the first count occurred outside the presence of the jury. The trial did not stop or even slow down as a result of the verbal sallies that the trial court characterized as "vulgar, scurrilous, and insulting language." (Tr. 3219).

Missouri: Mo. Ann. Stat. §476.110 (1952)
North Carolina: N.C. Gen. Stat. § 5-1 (1969)
North Dakota: N.D. Cent. Code § 27-10-01 (1960)
Oregon: Ore. Rev. Stat. § 33.010 (1969)
Washington: Wash. Rev. Code § 7.20.010 (1961)
Wisconsin: Wis. Stat. Ann. § 256.03 (1957)

Four States follow the basic New York definition, but delete the part that would allow a court to punish conduct which tends to "impair the respect due to its authority."

Idaho: Idaho Code § 7-601 (1948)
Minnesota: Minn. Stat. Ann. § 588.01 (1947)
Montana: Mont. Rev. Codes Ann. § 93-9801 (1964)
Utah: Utah Code Ann. § 78-32-1 (1953)

Again, it should be noted that the argument here is not that there was no other conduct which the trial court might have cited as tending more closely to fit the statutory definition of "obstructing the administration of justice." The trial court selected eleven specific charges. In his role as prosecutor and grand jury for the contempt prosecution, he made the choice of the charges to be brought. Even assuming *arguendo* that other conduct might have been charged, the record is closed and the conviction must stand or fall on the charges that were in fact brought. *Stirone v. United States*, 361 U.S. 212 (1960).

The extension of the statute by the State Supreme Court in this case is violative of the Constitution. Petitioner's convictions of at least nine of the eleven counts should be reversed on this ground.

V

THE 11 TO 22 YEAR SENTENCE IMPOSED UPON PETITIONER FOR CONTUMACIOUS MISBEHAVIOR IN COURT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

At the conclusion of a twenty-one day trial of three defendants on serious felony charges, a Pennsylvania trial court imposed upon petitioner, a *pro se* defendant in that trial, a sentence for contempt of court that is without precedent in Anglo-American history.

The court imposed eleven separate sentences of not less than one nor more than two years for courtroom incidents that had occurred on eleven days of the trial. As will be seen, each of those sentences is extraordinarily harsh. But the sentencing court did not make the eleven sentences concurrent. Each was made consecutive to previous sentences. The aggregate, a sentence of 11 to 22 years for courtroom misbehavior, is so wildly out of proportion with any reason-

able standards for fixing contempt sentences as to constitute cruel and unusual punishment.

The Pennsylvania contempt of court statute, which is 135 years old, contains no legislatively established maximum sentence for in-court contempts. Act of June 16, 1836, P.L. 784, § 23; Pa. Stat. Ann. tit. 17, § 2041 (1962). The Pensylvania statute is very similar to the federal statute, on which it evidently was patterned. 18 U.S.C. § 401. Where such statutes exist, sentencing courts and appellate courts have a responsibility far greater than that which exists under ordinary criminal laws. Since the range of permissible sentences is not prescribed, each sentence is subject to examination without the benefit of the normal presumption that attaches to a sentencing judge's discretion when exercised within statutory limits. Examination of the sentence imposed in this case shows a trial court decision that so far departs from reasonable and customary bounds as to violate the Eighth Amendment's ban of cruel and unusual punishment.

The absence of a statutory maximum sentence for in-court contempts in Pennsylvania does not mean that there are not relevant standards by which to gauge the extraordinary harshness of the sentence in this case. Many other State legislatures have adopted statutes that do contain maximum prison terms for such contempts, and their pattern is informative. Likewise, the history of judicial actions in dealing with in-court contempts, as reflected in reported decisions, shows a range of penalties that reflects the shared understanding of the trial and appellate judges as to proper sanctions for courtroom misbehavior.

There are analogous contempt statutes which cast light on the parameters that should be employed for in-court contempts. Finally, one can begin with the 11 to 22 year sentence imposed in this case and refer to the types of crimes that would or would not carry such a penalty in Pennsylvania.

By all of these benchmarks, it will be seen that the sentence in this case is so extreme as to be cruel and unusual punishment, calling for rejection under the Constitution.

The special urgency for judicial review of contempt sentences, where the legislature has not seen fit to impose limitations on the sentencing power, has been repeatedly noted by this Court. *E.g., Green v. United States*, 356 U.S. 165, 188 (1958); *Yates v. United States*, 355 U.S. 66 (1957); *Nilva v. United States*, 352 U.S. 385 (1957). A principle that has guided restraints on the punishing power for contempts was stated in *Anderson v. Dunn*, 6 Wheat. 204, 231 (1821), as "the least possible power adequate to the end proposed." This Court has reaffirmed that principle on many occasions. See *In re Michael*, 326 U.S. 224, 227 (1945); *In re Oliver*, 333 U.S. 257, 274 (1948). And see *United States* ex rel. *Robson v. Malone*, 412 F.2d 848 (7th Cir. 1969); *United States v. Conole*, 365 F.2d 306 (3d Cir. 1966), cert. denied, 385 U.S. 1025 (1967).

The sentence imposed upon petitioner by the Pennsylvania trial judge exceeds by a gross amount the statutory limitations of every State that has prescribed a maximum term for in-court contempts. A Table is appended to this brief summarizing those statutes. Pp. 53-54 *infra*. The highest maximum for such contempt, found in seven States (Alaska, Arizona, Connecticut, Iowa, Minnesota, Oregon and Washington) is six months. Many States provide considerably lower maximum prison terms. There is a 30 hour ceiling in Kentucky. Texas sets the maximum at three days. Five day limits are found in Alabama (Circuit Courts), Idaho and Montana. Five States (Arkansas, Ohio, Tennessee, Virginia, West Virginia) permit imprisonment, at least in summary convictions, up to only ten days. The Nevada maximum is set at 25 days. Five States (Mississippi, New York, North Carolina, North Dakota and Utah) fix the upper limit of confinement at 30 days. These statutes show the pattern of legislative judgments concerning the severity of prison sentences that should be open to sentencing

judges.[6] All fix terms that are a small fraction of the sentence in this case.

This summary of current statutes is in keeping with the findings of studies made of the statutes in force at or near the time of the adoption of the Constitution and the Bill of Rights. See *United States v. Barnett*, 376 U.S. 681 (1964) (Appendix to Opinion of the Court, 701-724; dissenting opinion of Mr. Justice Goldberg, 728, 741-749).

Although the Pennsylvania statutes do not fix any outer limits upon the punishments for in-court contempts, the legislature has set narrow restrictions on other kinds of contempt. For official misconduct of the officers of the courts, there can be no imprisonment. The only authorized penalty or for disobedience of the lawful process of the court, is a fine. Act of June 16, 1836, P.L. 784, § 24; Pa. Stat. Ann. tit. 17, § 2042 (1962). For indirect criminal contempts for violating a restraining order or injunction, the maximum punishment authorized is a fine of $100 or imprisonment not exceeding fifteen days, or both. Act of June 23, 1931, P.L. 925, §§ 1, 2; Pa. Stat. Ann. tit. 17, §§ 2047, 2048 (1962).

A review of the actual sentences imposed by trial judges for courtroom misbehavior, whether or not a statutory maximum exists, shows that the range of prison sentences is extremely low. A study was made of the reported decisions of appellate courts during the last twenty years. It was expected that these decisions would show the more severe sentences, since the impetus to appeal is less when a brief period of imprisonment is imposed and, in any event, such appeals would likely become moot. See, *e.g.*, *United States v. Galante*, 298 F.2d 72 (2d Cir. 1962). The results of this survey are attached in Table B, pp. 54-60 *infra*.

Nearly one hundred reported decisions that involved courtroom misbehavior were found. Some arose in civil

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[6]The Study Draft of a New Federal Criminal Code, issued by the National Commission on Reform of Federal Criminal Laws, (1970), proposes to limit the sentencing power of federal judges for courtroom contempts to either five days or thirty days. § 1341.

cases; most began during criminal proceedings. A majority involve sanctions imposed upon defense counsel. The cases listed in the Table involve the general kinds of misbehavior charged against petitioner. Cases arising from refusals to answer questions or from charges of false testimony were omitted. A few instances of disrespectful statements incorporated into writings delivered to courts were included.

The survey tends to support the statement by this Court in *Anderson v. Dunn*, 6 Wheat. 204, 228 (1821), that there are "known and acknowledged limits of fine and imprisonment" for criminal contempts. There is, however, further evidence confirming the observations of this Court that the penalties imposed in a few cases have increased appreciably in recent years. See *United States v. Barnett*, 376 U.S. 681, 694-695 (1964); *Bloom v. Illinois*, 391 U.S. 194, 207 (1968).

Within the twenty year period surveyed, only five cases were discovered in which the trial court imposed a criminal contempt sentence for in-court misbehavior in excess of six months. One of these, arising in the Illinois state courts, was considered by this Court in a federal habeas corpus proceeding. *DeStefano v. Woods*, 392 U.S. 631 (1968), affirming 382 F.2d 557 (7th Cir. 1967). *DeStefano* involved three sentences of one year, to be served concurrently, for "flagrant misconduct, disrespect and open defiance of the court's authority, continued in the face of repeated warnings and findings of contempt during the trial." 382 F.2d at 558. This Court considered only the question of DeStefano's claim of denial of trial by jury in allowing the one year sentence to stand.

Only one other of the five cases involving prison terms over six months came before this Court, and that one was reversed and remanded. *Panico v. United States*, 375 U.S. 29 (1963), reversing 308 F.2d 125 (2d Cir. 1962). A federal district court had summarily convicted and sentenced Panico to prison for 15 months imprisonment for wilful and deliberate acts, calculated to impede, obstruct, delay and abort a twelve week trial, including an incident where the defend-

ant jumped into the jury box. This Court vacated and remanded for a hearing under F. R. Crim. P. 42(b).

There were two other federal cases in this group of five; neither came before this Court. In both, the trial judges had imposed one year prison terms; in both the Courts of Appeals reversed. *Mirra v. United States*, 402 F.2d 888 (2d Cir. 1968); *Rollerson v. United States*, 343 F.2d 269 (D.C. Cir. 1964). The Court of Appeals for the Second Circuit reduced Mirra's sentence to six months, in light of *Cheff v. Schnackenberg*, 384 U.S. 373 (1966), since he had not been accorded a jury trial. Rollerson's conviction was reversed by the Court of Appeals for the District of Columbia Circuit and remanded for a hearing, like this Court's decision in *Panico*. After the hearing on remand, Rollerson was sentenced to a term of 90 days. See *Rollerson v. United States*, 405 F.2d 1078, 1080 (D.C. Cir. 1968).

The fifth and last case comes from Pennsylvania and involves the man who is petitioner in this case. *Commonwealth v. Mayberry*, 435 Pa. 290, 255 A.2d 548 (1969). Five separate sentences of one year, to be served consecutively, or an aggregate of five years in prison was imposed.

It is inappropriate here to comment on the validity or invalidity of the long sentences imposed in these five cases. The sentence was reversed in the three federal cases. Thus, there remain out of the entire survey only two cases, both originating in State courts, where prison terms in excess of six months stand for contempts committed in the presence of the court. Neither of the two is, of course, nearly comparable to the sentence in the present case.

The most significant finding of the case survey, reported in Table B, pp. 54-60 *infra*, is the overwhelming number of cases in which in-court contempts were dealt with without prison terms at all or with quite short periods of confinement. These decisions represent the norm by which the very few, extraordinary penalties over one year can be assessed. Viewed in that perspective, the sentence in the present case looms as a complete aberration.

Finally, this petitioner's sentence should be measured by the analogy made by the dissenting justice in the court below to those very serious offenses under Pennsylvania law that are not punishable by a sentence of as much as 22 years. He noted:

> "Although there is no doubt that the dignity of our courts must be upheld, by the contempt process, if necessary, in a Commonwealth where assault and battery is punishable by a maximum of two years' imprisonment, larceny by a maximum of five, voluntary manslaughter by a maximum of twelve, rape by a maximum of fifteen, and second degree *murder* by a maximum of twenty, a maximum of twenty-two years for interference with the courtroom process and insults to the judge is cruel and unusual." 434 Pa. at 488-489, 255 A.2d at 137 (Emphasis in original).

The cruelty of this 22 year sentence cannot be softened by the device of suggesting that it is merely a string of eleven separate sentences for separate and discrete offenses. Even if the offenses were divisible, the decision by the sentencing judge to make the penalties cumulative would be itself an act of extraordinary cruelty. Moreover, it would be a singular disservice to the trial court to suggest that he, or any other judge, would have imposed a two year sentence on a litigant merely for the verbal insults in each of the first nine counts. On the record, it is impossible to sustain the view that, for purpose of fixing sentence, there had been eleven separate sentences. The trial court selected an obviously mechanical technique for pronouncing sentence. A *per diem* method was used in stating the charges, grouping together all of the incidents of a given day into a single count. Then, with unexamined constancy, the trial judge imposed an identical sentence for each count regardless of the relative seriousness of the charged contumacious behavior. Plainly, in the mind of the sentencing judge, he viewed the alleged contempts of petitioner as having coalesced into a mass. This is quite apparent in the general excoriation

that preceded the statement of the charges and sentences. (Tr. 3219-3221). The result was the enormous 22 year sentence.

The sentence in this case is so far out of line with the "known and acknowledged limits" of punishment for courtroom contempts that it must be stricken. *Weems v. United States*, 217 U.S. 349 (1910). See also *O'Neil v. Vermont*, 144 U.S. 323, 339-340, 364 (1892) (dissenting opinion of Justice Field: "the inhibition [of the Eighth Amendment] is directed against all punishments which by their excessive length or severity are greatly disproportionate to the offenses charged."). The proportion of punishment to crime in this case is so aberrational as to violate "evolving standards of decency." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). And see *State v. Evans*, 73 Idaho 50, 58, 245 P.2d 788, 792 (1952); *State v. Kimbrough*, 212 S.C. 348, 46 S.E.2d 273 (1948); Packer, *Making the Punishment Fit the Crime*, 77 Harv. L. Rev. 1071 (1964).

Petitioner's sentence is cruel and unusual punishment.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

Curtis R. Reitz*
Counsel for Petitioner

August 15, 1970

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*The assistance of Margery K. Miller, Mitchell L. Bach, and Donald R. Auten in the preparation of this brief is gratefully acknowledged.

TABLE A

State Criminal Contempt Statutes

The following State criminal contempt statutes fix maximum terms of imprisonment:

Alabama: Circuit Court - 5 days. Ala. Code tit. 13, § 9 (1959).

Alaska: six months. Alaska Stat. § 09.50.020 (1962).

Arizona: six months. Ariz. Rev. Stat. Ann. § 13-341 (1956).

Arkansas: 10 days. Ark. Stat. Ann. §34-902 (1962).

Connecticut: six months. Conn. Gen. Stat. Ann. § 51-33 (1960).

Hawaii: Circuit Court - 30 days in summary proceeding; two years after jury trial. Hawaii Rev. Stat. § 729-1 (1968).

Idaho: 5 days. Idaho Code § 7-610 (1969).

Indiana: three months. Ind. Ann. Stat. § 3-906 (1946).

Iowa: six months. Iowa Code § 665.4 (1950).

Kentucky: 30 hours. Ky. Rev. Stat. § 432.260 (1970).

Louisiana: 30 days. La. Rev. Stat. § 13-4611 (1968).

Michigan: 30 days. Mich. Stat. Ann. § 27A.1715 (1962).

Minnesota: six months. Minn. Stat. Ann. § 588.10 (1947).

Mississippi: 30 days. Miss. Code Ann. § 1656 (1957).

Montana: 5 days. Mont. Rev. Codes Ann. § 93-9810 (1964).

Nevada: 25 days. Nev. Rev. Stat. § 22.100 (1963).

New York: 30 days. N.Y. Judiciary Law § 751.1 (1969).

North Carolina: 30 days. N.C. Gen. Stat. § 5-4 (1969).

North Dakota: 30 days. N.D. Cent. Code § 27-10-2 (1960).

Ohio: 10 days. Ohio Rev. Code Ann. § 2705.05 (1954).

Oregon: six months. Ore. Rev. Stat. § 33.020 (1969).

Tennessee: 10 days; special provision for profanity, 24 hours. Tenn. Code Ann. §§ 23-903, 23-907 (1956).

Texas: 3 days. Tex. Rev. Civ. Stat. Ann. arts. 1911, 1955 (1962).

Utah: 30 days. Utah Code Ann. §78-32-10 (1953).

Virginia: 10 days in summary proceedings. Va. Code Ann. § 18.1-295 (1960).

Washington: six months. Wash. Rev. Code § 7.20.020 (1961).

West Virginia: 10 days in summary proceedings. W. Va. Code Ann. § 61-5-26 (1966).

Wisconsin: 30 days. Wis. Stat. Ann. § 256.06 (1957).

Three States have a statutory maximum by virtue of characterizing criminal contempt as a misdemeanor and subject to its general ceiling for all misdemeanors. Calif. Penal Code § 166 (West 1970); State v. Janiec, 25 N.J. Super. 197, 95 A.2d 762 (1962); S.D. Comp. Laws § 16-15-2 (1969).

TABLE B

Appellate Cases Involving In-Court Contempts

The following cases, involving in-court contempt prosecutions, were found by a search of the reported opinions of appellate courts in the past twenty years. The list was gathered from these reports: F.2d, vol. 177 to 425; A.2d, vol. 70 to 266; N.Y.S.2d, vol. 92 to 311; N.E.2d, vol. 90 to 258; S.E.2d, vol. 57 to 173; So.2d, vol. 43 to 236; S.W.2d, vol. 225 to 453; P.2d, vol. 213 to 470; N.W.2d, vol. 40 to 176. The cases are listed in ascending order of severity of punishment.

Scott v. Davis, 328 S.W.2d 394 (Mo. 1959) (lawyer: $10; rev'd)

State v. Zoppi, 72 N.J. Super. 432, 178 A.2d 632 (App. Div. 1962) (lawyer: $25; rev'd)

State v. Zarafu, 35 N.J. Super. 177, 113 A.2d 696 (App. Div. 1955) (litigant: $25; rev'd)

Marino v. Cocuzza, 14 N.J. Super. 16, 81 A.2d 181 (App. Div. 1951) (lawyer: $36; rev'd)

Phelan v. People of the Territory of Guam, 394 F.2d 293 (9th Cir. 1968) (lawyer: $50; rev'd)

Holt v. Commonwealth, 205 Va. 332, 136 S.E.2d 809 (1964), *rev'd*, 381 U.S. 131, 14 L. Ed. 2d 290, 85 S. Ct. 1375 (1965) (2 lawyers: $50; rev'd)

Golden v. Superior Court of Cochise County, 8 Ariz. App. 25, 442 P.2d 562 (1968) (lawyer: $50; rev'd)

U.S. v. Albert, 294 F.2d 879 (6th Cir. 1961) (lawyer: $100; rev'd)

In re Bloom, 423 Pa. 192, 223 A.2d 712 (1966) (lawyer: $100; rev'd)

Blake v. Municipal Court, 144 Cal. App. 2d 131, 300 P. 2d 755 (1st Dist. 2d Div. 1956) (unclear if lawyer or litigant: $100; rev'd)

People v. Aimen, 98 Ill. App. 2d 203, 240 N.E.2d 337 (1968) (lawyer: $200; rev'd)

White v. State, 218 Ga. 290, 127 S.E.2d 668 (1962) (lawyer: $200; rev'd)

Bennett v. Superior Court, 99 Cal. App. 2d 585, 222 P.2d 276 (4th Dist. 1950) (lawyer: $500; rev'd)

Brutkiewicz v. State, 280 Ala. 218, 191 So. 2d 222 (1966) (lawyer: 5 hours and $50; rev'd)

Sullivan v. State, 419 P.2d 559 (Okla. Crim. 1966) (pro se: 1 day and $500; rev'd)

People v. Loughran, 2 Ill. 2d 258, 118 N.E.2d 310 (1954) (lawyer: 3 days; rev'd)

Chula v. Superior Court, 109 Cal. App. 2d 24, 240 P.2d 398 (4th Dist. 1952) (lawyer: 5 days; rev'd)

In re Hallinan, 71 Cal. 2d ___, 459 P.2d 255, 81 Cal. Rptr. 1 (1969) (lawyer: 5 days; rev'd)

In re Henry, 369 Mich. 347, 119 N.W.2d 671 (1963) (lawyer: 5 days; rev'd)

State v. Wingo, 221 Miss. 542, 73 So. 2d 107 (1954) (3 lawyers, 1 litigant: $100 and 10 days, ½ of fine and of jail suspended; rev'd)

U.S. *ex rel.* Robson v. Malone, 412 F.2d 848 (7th Cir. 1969) (spectator: 10 days; vacated)

Parmelee Transporation Co. v. Keeshin (In re Freeman), 292 F.2d 806 (7th Cir. 1961) (lawyer: 10 days; rev'd)

In re Brownlow, 252 A.2d 903 (D.C. App. 1969) (lawyer: 10 days; rev'd)

Parmelee Transporation Co. v. Keeshin (in re McConnell), 294 F.2d 310 (7th Cir. 1961), *rev'd*, 370 U.S. 230 (1962) (lawyer: 30 days, modified to $100; rev'd)

Ex parte Wisdom, 223 Miss. 865, 79 So. 2d 523 (1955) (litigant: 10 days and $50; rev'd)

In re Osborne, 344 F.2d 611 (9th Cir. 1965) (lawyer: 10 days and $200; vacated)

U.S. *ex rel.* Robson v. Malone, 412 F.2d 848 (7th Cir. 1969) (spectator: 30 days; vacated)

U.S. v. Bradt, 294 F.2d 879 (6th Cir. 1961) (lawyer: 30 days; rev'd)

Shibley v. U.S., 236 F.2d 238 (9th Cir. 1956), *cert. denied*, 352 U.S. 873 (1956) (lawyer pro se: 30 days; remanded)

State *ex rel.* Stanton v. Murray, 231 Ind. 223, 108 N.E. 2d 251 (1952) (lawyer: 30 days and $300; rev'd)

Cassidy v. Cassidy, 181 So. 2d 649 (Fla. App. 1966) (litigant: 6 months; remanded, to be no more than 2 months)

U.S. v. Panico, 308 F.2d 125 (2d Cir. 1962), *vacated*, 375 U.S. 29 (1963) (litigant: 15 months; vacated)

Ash v. State, 93 Okla. Crim. 125, 225 P.2d 816 (1950) (lawyer: $10; aff'd)

In re DuBoyce, 241 F.2d 855 (3rd Cir. 1957) (pro se: $50 and 15 days, jail suspended; aff'd)

Whiteside v. State, 148 Conn. 77, 167 A.2d 450 (1961) (litigant: $100; aff'd)

Young v. State, 275 P.2d 358 (Okla. Crim. 1954) (2 litigants: $100; aff'd)

Stern v. Chandler, 153 Me. 62, 134 A.2d 550 (1957) (lawyer: $100; aff'd)

In re Gates, 248 A.2d 671 (D.C. App. 1968) (lawyer: $100; aff'd)

O'Brien v. State, 261 Wis. 570, 53 N.W.2d 534 (1952) (lawyer: $100; aff'd)

Appeal of Levine, 372 Pa. 612, 95 A.2d 222, *cert. denied*, 346 U.S. 858 (1953) (lawyer: $100 and costs; aff'd)

Hayden v. Helfand, 28 App. Div. 2d 567, 280 N.Y.S.2d 420 (1967) (lawyer: $150; aff'd)

In re Clawans, 69 N.J. Super. 373, 174 A.2d 367 (App. Div. 1961), *cert. denied*, 370 U.S. 905 (1962) (lawyer: $200; aff'd)

State v. Jones, 105 N.J. Super. 493, 253 A.2d 193 (L. Div. 1969) (litigant: 30 days; modified to $200)

Champion v. State, 456 P.2d 571 (Okla. Crim. 1969) (lawyer: $250; aff'd)

Sala v. Shapiro, 18 App. Div. 2d 843, 238 N.Y.S.2d 53 (1963) (unclear if lawyer or litigant: $250 and 10 days; modified to $250)

Gibbons v. U.S. District Court for the District of Nevada, 416 F.2d 14 (9th Cir. 1969), *cert. denied*, 396 U.S. 1041 (1970) (lawyer: $500; aff'd)

Ray v. Huddleston, 372 F.2d 61 (6th Cir. 1964) (litigant: 6 hours; aff'd)

Offutt v. U.S., 247 F.2d 88 (D.C. Cir.), *cert. denied*, 355 U.S. 856 (1957) (lawyer: 10 days; modified to 6 hours)

Guatreaux v. Gautreaux, 220 La. 564, 57 So. 2d 188 (1952) (lawyer: 2 days and $200; modified to 1 day and $100)

Spencer v. Dixon, 248 La. 604, 181 So. 2d 41 (1965) (lawyer: 1 day and $100) (contempt in appellate court)

Borden v. Tobias, 42 Misc. 2d 1069, 249 N.Y.S.2d 891 (Sup. Ct. 1964) (lawyer: $50 and 2 days; review denied)

In re Ciraolo, 70 Cal. 2d 389, 450 P.2d 241, 74 Cal. Rptr. 865 (1969) (lawyer: 3 days and $200; aff'd)

In re Ellis, 264 A.2d 300 (D.C. App. 1970) (pro se: 5 days; aff'd)

Garner v. Amsler, 238 Ark. 34, 377 S.W.2d 872 (1964) (lawyer: 5 days and $250; aff'd)

State v. Alexander, 257 A.2d 778 (Me. 1969), *cert. denied*, 397 U.S. 924 (1970) (lawyer: 5 days and $500; aff'd)

Ex parte Dancer, 171 Tex. Crim. 381, 350 S.W.2d 544 (1961) (lawyer: 24 days and $925; modified to 9 days and $925)

Moity v. Mahfouz, 137 So. 2d 513 (La. App. 1961) (unclear if lawyer or litigant: 10 days; review denied)

In re Young, 325 P.2d 85 (Okla. Crim. 1958) (lawyer: 10 days; aff'd)

State v. Caffrey, 70 Wash. 2d 120, 422 P.2d 307 (1966) (lawyer: 10 days; aff'd)

State v. Gussman, 34 N.J. Super. 408, 112 A.2d 565 (App. Div. 1955) (litigant: 10 days; aff'd)

McCraw v. Adcox, 217 Tenn. 591, 399 S.W.2d 753 (1966) (pro se: 10 days and $50; aff'd)

Gautreaux v. Gautreaux, 225 La. 254, 72 So. 2d 497 (1954) (lawyer: 10 days and $200; aff'd)

Garner v. Amsler, 238 Ark. 34, 377 S.W.2d 872 (1964) (lawyer: 10 days and $250; aff'd)

Comstock v. U.S., 419 F.2d 1128 (9th Cir. 1969) (litigant: 15 days; aff'd)

Watson v. Holifield, 229 Miss. 27, 89 So. 2d 924 (1956) (sheriff: 15 days and $100; review denied)

U.S. v. Galante, 298 F.2d 72 (2d Cir. 1962 (2 litigants: 20 days; aff'd)

Sachse v. Sachse, 102 So. 2d 300 (Fla. App. 1958) (lawyer: 20 days; aff'd)

In re Katz, 309 N.Y.S.2d 76 (Sup. Ct. 1970) (spectator: 30 days; review denied)

U.S. v. Sacher, 182 F.2d 416 (2d Cir. 1950), *aff'd*, 343 U.S. 1 (1952) (lawyer: 1 month; aff'd)

Johnson v. State, 233 So. 2d 116 (Miss. 1970) (litigant: 4 months; modified to 1 month)

McCallister v. McCallister, 95 N.J. Super. 429, 231 A.2d 394 (App. Div. 1967) (pro se: 1 month, 11 months probation; aff'd)

Garland v. State, 101 Ga. App. 395, 114 S.E. 2d 176 (1960) (lawyer: 40 days; aff'd)

Sarner v. Sarner, 28 N.J. 519, 147 A.2d 244, *cert. denied*, 359 U.S. 533 (1959) (litigant: 60 days; aff'd)

U.S. v. Schiffer, 351 F.2d 91 (6th Cir. 1965), *cert. denied*, 384 U.S. 1003 (1966) (lawyer: 60 days and $1000, fine later stricken; aff'd)

MacInnis v. U.S., 191 F.2d 157 (9th Cir. 1951), *cert. denied*, 342 U.S. 953 (1952) (lawyer: 3 months; aff'd)

Rollerson v. U.S., 343 F.2d 269 (D.C. Cir. 1964) (litigant: 1 year; remanded) (on remand—90 days)

U.S. v. Sacher, 182 F.2d 416 (2d Cir. 1950), *aff'd*, 343 U.S. 1 (1952) (2 lawyers: 4 months; aff'd)

U.S. v. Sacher, 182 F.2d 416 (2d Cir. 1950), *aff'd*, 343 U.S. 1 (1952) (2 lawyers and 1 pro se: 6 months; aff'd)

Hallinan v. U.S., 182 F.2d 880 (9th Cir. 1950), *cert. denied*, 341 U.S. 952 (1951) (lawyer: 6 months; aff'd)

Robles v. U.S., 279 F.2d 401 (9th Cir. 1960), *cert. denied*, 365 U.S. 836 (1961) (pro se: 6 months; aff'd)

State v. Newton, 467 P.2d 978 (Ore. App. 1970) (litigant: 6 months; aff'd)

Taylor v. Gladden, 232 Ore. 599, 377 P.2d 14 (1962) (litigant: 6 months; aff'd)

State v. Watson, 182 Neb. 692, 157 N.W.2d 156 (1968) (litigant: 6 months; aff'd)

Mirra v. U.S., 402 F.2d 888 (2d Cir. 1968) (litigant: one year; reduced to 6 months)

DeStefano v. Woods, 382 F.2d 557 (7th Cir. 1967), *aff'd*, 392 U.S. 631 (1968) (pro se: one year and $2000; aff'd)

Commonwealth v. Mayberry, 435 Pa. 290, 255 A.2d 548 (1969) (pro se: 5 years; aff'd)

In the following cases, the penalty imposed by the trial court was not stated in the opinion of the appellate court:

In re Logan, 52 N.J. 475, 246 A.2d 441 (1968) (lawyer: "fined"; rev'd)

Kasson v. Hughes, 390 F.2d 183 (3rd Cir. 1968) (lawyer: "fined"; rev'd)

Fawick Airflex Co. v. United Electrical R. & M. Wkrs., 60 Ohio L. Abs. 451, 101 N.E.2d 797 (Ohio App. 1950) (2 litigants: "fine and sentence"; aff'd)

In re Burns, 19 Mich. App. 525, 173 N.W.2d 1 (1969) (lawyer: not given; aff'd)

Boatright v. State, 106 Ga. App. 801, 128 S.E.2d 559 (1962) (lawyer: not given; aff'd)

Crudup v. State, 218 Ga. 819, 130 S.E.2d 733, *cert. denied*, 375 U.S. 829 (1963) (lawyer: not given; aff'd)

Banks v. Markowitz, 4 App. Div. 2d 1022, 168 N.Y.S.2d 852 (1957) (litigant: not given; aff'd)

Lewis v. Rice, 261 S.W.2d 804 (Ky. App. 1953) (lawyer: not given; writ of prohibition refused)

IN THE

Supreme Court of the United States

October Term, 1970

No. 121

RICHARD O. J. MAYBERRY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR RESPONDENT

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II.

Authorities Cited.

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BRIEF FOR RESPONDENT

Opinions Below

The majority opinion of the Pennsylvania Supreme Court, written by Mr. Justice Jones, is reported at 434 Pa. 478, 255 A. 2d 131 (1969). A Concurring Opinion by Mr. Justice Roberts and A Concurring And Dissenting Opinion by Mr. Justice O'Brien are set forth in the same Reporters. All three Opinions are reproduced in the Appendix. No written Opinion was filed by the trial court.

Jurisdiction

The jurisdiction of your Honorable court is properly invoked under 28 U. S. C. § 1257(3).

Constitutional and Statutory Provisions Involved

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Eighth Amendment to the Constitution of the United States provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the Constitution of the United States provides:

> "Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Pennsylvania Contempt Statutes. Act of June 16, 1836, P. L. 784, § 23:

"The power of the several courts of this Commonwealth to issue attachments and to inflict summary punishments for contempts of court shall be restricted to the following cases, to-wit;

I. To the official misconduct of the officers of such courts respectively;

II. To disobedience or neglect by officers, parties, jurors, or witnesses of or to the lawful process of the court;

III. To the misbehavior of any person in the presence of the court, thereby obstructing the administration of justice."

Act of June 16, 1836, P. L. 784, § 24:

"The punishment of imprisonment for contempt as aforesaid shall extend only to such contempts as shall be committed in open court, and all other contempts shall be punished by fine only."

Act of June 23, 1931, P. L. 925, § 1:

"In all cases where a person shall be charged with indirect criminal contempt for violation of a restraining order or injunction issued by a court or judge or judges thereof, the accused shall enjoy—

(a) the rights as to admission to bail that are accorded to persons accused of crime;

(b) the right to be notified of the accusation and a reasonable time to make a defense, provided the alleged contempt is not committed in the immediate view or presence of the court;

(c) upon demand, the right to a speedy and public trial by an impartial jury of the judicial district wherein the contempt shall have been committed, provided that this requirement shall not be construed to apply to contempts committed in the presence of the

court or so near thereto as to interfere directly with the administration of justice, or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court; and

(d) the right to file with the court a demand for the retirement of the judge sitting in the proceeding, if the contempt arises from an attack upon the character or conduct of such judge, and if the attack occurred otherwise than in open court. Upon the filing of any such demand, the judge shall thereupon proceed no further but another judge shall be designated by the presiding judge of said court. The demand shall be filed prior to the hearing in the contempt proceeding."

Questions Presented

I. Whether a judge may have summarily sentenced a contemnor for criminal contempt committed in his presence without affording the contemnor a jury trial, the right to speak in mitigation of sentence, or specially-appointed counsel?

II. Whether due process requires the trial judge to disqualify himself where the contempt was committed in his presence or whether the peculiar facts herein warrant such action?

III. Whether the Pennsylvania Criminal Contempt Statute, as applied to petitioner, is unconstitutionally vague?

IV. Whether Petitioner's sentence of one-to-two years for each contempt constitutes cruel and unusual punishment?

Counter-Statement of the Case

A. The Circumstances of the Criminal Conviction.

Petitioner and two co-defendants, Herbert Fred Langnes and Dominic Codispoti, were indicted at No. 4672 of 1965 in the Criminal Courts of Allegheny County, Pennsylvania. The indictment contained the counts of: 1) Holding Hostages in a Penal Institution, and 2) Prison Breach. Petitioner entered a plea of not guilty and waived his right to representation by counsel, choosing to act as his own counsel at trial. The court appointed Samuel H. Sarraf, Esq., of the Public Defender's Office, to act as petitioner's consultant throughout the trial. A trial commenced on November 10, 1966 before Judge Fiok and a jury. On December 9, 1966, the jury returned a verdict of guilty as to both counts of the indictment as to petitioner and both co-defendants.

On December 12, Judge Fiok sentenced petitioner to serve a term of imprisonment of not less than fifteen or more than thirty years as to the first count of the indictment (Holding Hostages); on the second count (Prison Breach), a sentence of not less than five or more than ten years was imposed. These sentences were to be served consecutively and were to take effect at the expiration of any sentence appellant was serving at the time they were imposed.

On December 12, 1966, Judge Fiok also sentenced petitioner for eleven separate acts of criminal contempt. A sentence of not less than one or more than two years by separate and solitary confinement at labor was imposed for each contempt. These sentences are to be served consecu-

tively upon the expiration of the sentences imposed at No. 4672 of 1965.[1]

B. The State Court Appeal.

On February 1, 1967, petitioner filed eleven separate appeals from the eleven contempt citations in the Supreme Court of Pennsylvania. The Supreme Court twice continued these appeals on August 7, 1967 and on October 23, 1967, on motion of the petitioner.

On March 5, 1968, petitioner's petition to again continue the argument of these appeals was denied. Thereafter, on March 19, 1968, a judgment of non-pros was entered because of petitioner's failure to file a brief. Subsequently, petitioner filed a Petition to Remove Judgment of Non Pros and to Reinstate the Appeals which petition was granted on August 5, 1968. Peter Kanjorski, Esq. was appointed to represent petitioner in these appeals on August 13, 1968.

Petitioner filed a *pro se* brief which was supplemented by a brief submitted by appointed counsel. Mayberry contended: (1) that he was denied the right to trial by jury on the contempt charges in violation of the Sixth and Fourteenth Amendments to the United States Constitution; (2) that he was denied due process of law by being convicted and sentenced for criminal contempt without procedural safeguards; and (3) that he has been subjected to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution in being sentenced to a minimum of eleven and a maximum

[1] When the petitioner was originally sentenced in open court, the sentences for contempt were to take effect at the expiration of the sentences petitioner was then serving. Subsequently, the sentences were changed so that they would become effective at the expiration of the sentences imposed at No. 4672 of 1965. Order of Judge Fiok dated December 12, 1966.

of twenty-two years on the contempt charges. Appointed counsel raised additionally: (1) that the court erred in failing to provide Mayberry with substantive constitutional safeguards by not apprising him of the nature and elements of the crime of criminal contempt, by not giving timely notice of the commission of criminal contempt, by not informing him of his right to counsel and in failing to provide him with counsel at the time of sentence; and (2) that the statute providing for criminal contempt is unconstitutional as applied to the instant factual situation.

After oral argument on November 12, 1968 the Supreme Court affirmed the sentence of the trial court by Opinion dated April 23, 1969.

Petitioner's *pro se* petition for writ of certiorari to your Honorable court was granted on April 8, 1970.

Summary of Argument

The lower court correctly held that, under the State of Pennsylvania law in 1966 when petitioner was sentenced for direct criminal contempt committed in the presence of the court, petitioner was sentenced in accordance with the due process of the law.

I.

Petitioner was not entitled to a jury trial on the contempt charge since *Bloom v. Illinois*, 391 U. S. 194 (1968) granting contemnors the right to a jury trial is not retroactive. Even though *Baldwin v. New York*, (decided June 22, 1970) grants the right to jury trial in all offenses where a one-year prison sentence may be imposed, the Commonwealth urges that *Baldwin* should be prospective and not be applicable here.

Consequently, petitioner's sentence must be judged in accordance with 1966 standards. Since his contempts were committed in the presence of the court, he was correctly sentenced under the court's plenary power. He was not entitled to present a defense or call witnesses in his behalf. He was not entitled to notice that the court considered his actions contumacious although here the court specifically warned petitioner on several occasions. In addition, petitioner's conduct was so outrageous that, with his previous experience in contempt proceedings, he must have known that his actions were contumacious.

Petitioner waived any right to speak in his defense as a result of the constant verbal abuse inflicted during the trial. He lost his right, through his conduct, to have appointed counsel speak for him. Although he specifically rejected any assistance from court-appointed counsel, counsel was present to render any assistance requested. Petitioner did not petition the court to modify the sentence but chose instead to file a direct appeal to the Pennsylvania Supreme Court.

II.

The sentencing court imposed punishment through its plenary powers to punish summarily in protecting its judicial dignity and decorum. While a great many of petitioner's verbal abuses appeared to be directed at the trial court personally, the thrust of petitioner's contumacious actions were toward preventing the administration of justice and the orderly procedure of the trial. In addition, petitioner never petitioned for disqualification of the sentencing judge.

III.

The Pennsylvania contempt statute, which provides for punishment where contumacious actions obstruct the ad-

ministration of justice, is not unconstitutionally vague as applied here since petitioner's actions attempted to create chaos and disturbance in the courtroom, and caused innumerable delays. It is only through the patience and perseverence of the trial court that petitioner was unsuccessful in his attempt to prevent his trial.

IV.

Petitioner committed eleven separate acts of contempt and was correctly sentenced for each contempt. His actions were not only in the nature of personal abuse to the trial court but were directed to disruption of the orderly and proper administration of justice. Imprisonment has historically been the punishment for direct criminal contempt. Petitioner was properly sentenced.

ARGUMENT

I. In 1966, a judge may have summarily sentenced a contemnor for criminal contempt committed in his presence without affording the contemnor a jury trial, the right to speak in mitigation of sentence, or specially-appointed counsel.

A. Petitioner was not entitled to a non-summary court trial.

Petitioner was sentenced for eleven separate crimes constituting direct criminal contempt in full accordance with Pennsylvania law which provides that the right and power to punish such actions is inherent in the court in which the contemptuous action occurred. The statutory basis is found in the Act of June 16, 1836, P. L. 784, § 23, 17 P. S. § 2041:

> The power of the several courts of this Commonwealth to issue attachments and to inflict summary punish-

> ments for contempts of court shall be restricted to the following cases, to-wit:
>
> * * *
>
> iii to the misbehavior of any person in the presence of the court, thereby obstructing the administration of justice.

See *Knaus v. Knaus,* 387 Pa. 370, 376, 127 A. 2d 669 (1956); *Levine Contempt Case,* 372 Pa. 612, 618, 95 A. 2d 222 (1953); *cert. denied,* 346 U. S. 858; *Passmore Williamson's Case,* 26 Pa. 9, 18 (1855).

The categories of contempt and the definition of direct criminal contempt under Pennsylvania law were set forth in *Knaus v. Knaus, supra.*

> Contempts broadly fall into two categories, civil and criminal. Criminal contempts are further subdivided into direct and indirect contempts.
>
> A direct criminal contempt consists of misconduct of a person in the presence of the court, or so near thereto as to interfere with its immediate business, and punishment for such contempts may be inflicted summarily: Act of June 16, 1836, P. L. 784, § 23, 24, 17 P. S. § 2041, 2042: Levine Contempt Case, 372 Pa. 612, 95 A. 2d 222; Snyder's Case, 301 Pa. 276, 152 A. 33.
>
> The dominant purpose of a contempt proceeding determines whether it is civil or criminal. If the dominant purpose is to vindicate the dignity and authority of the court and to protect the interest of the general public, it is a proceeding for criminal contempt (387 Pa. at 375-376).

See also: *Commonwealth ex rel. Beghian v. Beghian,* 408 Pa. 414, 184 A. 2d 270 (1962); *Commonwealth v. Harris,* 409 Pa. 163, 185 A. 2d 586 (1963); *Philadelphia Marine Trade Ass'n. v. International Longshoreman's Ass'n.,* 392 Pa. 500, 509, 140 A. 2d 814 (1958).

If ever action constituted "misbehavior of any person in the presence of the court, thereby obstructing the administration of justice", petitioner's does. If ever "the dominant purpose" of a proceeding was "to vindicate the dignity and authority of the court", the purpose of this case is such. It is submitted that action as contemptuous as petitioner's has never been reported in the Commonwealth of Pa. Petitioner led his co-defendants in a deliberate campaign to force the trial judge to commit reversible error and to prevent the conduct of his trial. His record is replete with evidence of their contemptuous conduct. Examples may be found on almost any of the three thousand odd pages of the trial transcript. Many of the contemptuous acts were ignored by the trial judge in imposing the sentences for criminal contempt.

A review of the pages of the trial transcript reveals that the petitioner accused the trial judge of denying him a fair trial and called him "a hatchet man for the state" and a "dirty son-of-a-bitch" (TT. 42).[2] He later implied that the court did not know how to rule on the defendant's motions and was acting as a "Gilbert and Sullivan the way you sustain the District Attorney . . ." (TT. 1296).

Petitioner stated to the court that he would not be "railroaded into any life sentence by any dirty tyranical old dog like yourself" (TT. 1627). He also asked the trial judge "to keep your mouth shut . . ." (TT. 1793).

Petitioner accused the court of working for the prison authorities; told him to "go to hell"; that he did not "give a good God-damn" what the court suggested; and called the court a "bum" and a "stumbling dog" (TT. 1839).

[2] Numerals in parentheses preceded by the letters "TT" refer to pages of the trial transcript.

Petitioner stated that the rulings of the court were "unimportant" and that he would only be silent if gagged (TT. 2280).

Petitioner again accused the court of acting as a "Gilbert and Sullivan" in sustaining the prosecutor's objections (TT. 2314). He accused the court of conducting a "Spanish Inquisition" (TT. 2403). He again accused the court of railroading him and told the trial judge that he was in need of psychiatric treatment and was "some kind of a nut" and was working for Warden Maroney (TT. 2408-2410).

Petitioner stated that the trial was the "craziest" he had ever seen (TT. 2503-2504). He further refused to abide by the rulings of the court in the calling of witnesses (TT. 2591-2592.) Petitioner accused the court of denying him the right to examine certain witnesses because the trial judge was afraid of the facts that might be revealed. He again used profanity in replying to the court and called the trial judge a "creep" (TT. 2610-2612).

Petitioner accused the court of arguing with him and stated to the court that he refused to argue with "fools" (TT. 2682-2683).

Petitioner again accused the court of denying him a fair trial and refused to abide by the rulings of the court to the point that the court was forced to order him removed from the courtroom (TT. 3018-3021).

Petitioner stated in open court his intention of disrupting the court's charge to the jury, which he did and continued to do even though gagged. The court was finally forced to have him placed in a strait jacket and removed to an adjoining courtroom into which the charge to the jury was

broadcast through a public address system (TT. 3089-3094c).

While the statement that "It is most difficult to peruse a 'cold record' and feel the tension and spirit of a trial" has been termed a "trite observation" (*Commonwealth v. Lufton*, 389 Pa. 273, 282, 133 A. 2d 203 (1957)), it is respectfully submitted that the record cannot show the vicious and insulting manner in which petitioner delivered the litany of abuse, profanity and disrespect recited above. In any event, the record does clearly show that petitioner's speech and actions, uttered and committed in open court, constituted misbehavior and disrupted the orderly administration of justice. His behavior is all the more contemptuous when it is remembered that he was representing himself and acting as his own attorney at this trial, although not a member of the Bar.

The Pennsylvania Supreme Court characterized this behavior as "a course of conduct . . . almost beyond belief and of an obviously and patently planned and determined attempt . . . to interfere with the administration of justice and to make a farce and mockery of his trial." The court also described petitioner's actions as "outrageous conduct during the course of the trial". The court concluded that "the record further demonstrates beyond any question that [petitioner's] behavior was calculated and planned with the aim of disrupting the orderly procedure of the trial and the administration of justice."

The Pennsylvania Supreme Court held that the contempt charges upon which petitioner was sentenced constituted "*direct* criminal contempt which took place in the presence of the court and the jury" and upheld the trial court's right to sentence petitioner summarily.

Persons charged with direct criminal contempt are not entitled to a jury trial in the Commonwealth of Pennsylvania. Act of June 23, 1931, P. L. 925, § 1, 17 P. S. § 2047 which is set forth in full, as follows:

> In all cases where a person shall be charged with indirect criminal contempt for violation of a restraining order or injunction issued by a court or judge or judges thereof, the accused shall enjoy—
>
> (a) The rights as to admission to bail that are accorded to persons accused of crime;
>
> (b) The right to be notified of the accusation and a reasonable time to make a defense, provided the alleged contempt is not committed in the immediate view or presence of the court;
>
> (c) Upon demand, the right to a speedy and public trial by an impartial jury of the judicial district wherein the contempt shall have been committed, provided that this requirement shall not be construed to apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice, or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court; and
>
> (d) The right to file with the court a demand for the retirement of the judge sitting in the proceeding, if the contempt arises from an attack upon the character or conduct of such judge, and if the attack occurred otherwise than in open court. Upon the filing of any such demand, the judge shall thereupon proceed no further but another judge shall be designated by the presiding judge of said court. The demand shall be filed prior to the hearing in the contempt proceeding.

Imprisonment is the proper punishment for direct criminal contempt. Act of June 16, 1836, P. L. 784, § 23, 24, 17 P. S. § 2041, 2042. The sentences imposed by the trial judge in the instant case are in accordance with Pennsylvania

law. The Pennsylvania Supreme Court found that compliance with these requirements protected the petitioner's due process rights.

Neither was Petitioner's Sixth Amendment right to trial by jury as incorporated into the Fourteenth Amendment violated.

Petitioner was summarily convicted of direct criminal contempt on December 12, 1966. Your Honorable Court in *Duncan v. Louisiana*, 391 U. S. 145 (1968), *Bloom v. Illinois*, 391 U. S. 194 (1968) and *Dyke v. Taylor Implement Manufacturing Co., Inc.*, 391 U. S. 216 (1968), all decided May 20, 1968, has announced principles which, if applicable to the instant case, would entitle the appellant to a jury trial.

However, it has also decided that the constitutional interpretations announced in *Duncan v. Louisiana, supra*, and *Bloom v. Illinois, supra*, are not to be applied to trials begun prior to May 20, 1968.[3] *DeStefano v. Woods*, 392 U. S. 631 (1968); *Carcerano v. Glidden*, 392 U. S. 631 (1968). In *DeStefano v. Woods, supra*, the court announced:

> The considerations are somewhat more evenly balanced with regard to the rule announced in *Bloom v. State of Illinois*. One ground for the *Bloom* result was the belief that contempt trials, which often occur before the very judge who was the object of the allegedly contemptuous behavior, would be more fairly tried if a jury determined guilt. Unlike the judge, the jurymen will not have witnessed or suffered the alleged contempt, nor suggested prosecution for it. However, the tradition on non-jury trials for contempts was more firmly established than the view that States could dispense with jury trial in normal criminal prosecutions, and reliance on the cases overturned by *Bloom*

[3] In view of the holding that *Duncan* and *Bloom* are not to be retroactively applied, the Commonwealth does not deem it necessary to discuss petitioner's failure to request a jury trial.

> *v. State of Illinois* was therefore more justified. Also, the adverse effects on the administration of justice of invalidating all serious contempt convictions would likely be substantial. Thus, with regard to the *Bloom* decision, we also feel that retroactive application is not warranted.

Obviously, these cases do not apply to a conviction on December 12, 1966.

Petitioner however, would have your Honorable Court extend to him ancillary rights under the *Bloom* decision while conceding that the jury trial holding is inapplicable to him. The Commonwealth maintains that this interpretation of *Bloom* is unwarranted under the *Bloom* decision and urges your Honorable Court to reject this contention.

The Commonwealth cannot take exception to the Petitioner's discussion relative to your Honorable Court's rejection of the theory of vindicating the authority of the court to justify summary trial of serious contempt charges because of the serious punishment involved here. Were it not for the actual sentence here of one to two years for each contempt, or an aggregate of eleven to twenty-two years, the Commonwealth would argue that the *Bloom* decision was not concerned with direct criminal contempt as is present here. The statement of Mr. Justice White that

> Although Rule 42 (a) is based in part on the premise that it is not necessary specially to present the facts of a contempt which occurred in the very presence of the Judge, it also rests on the need to maintain order and a deliberative atmosphere in the courtroom. *The power of a judge to quell disturbance cannot attend upon the impaneling of a jury.* There is, therefore, a strong temptation to make exception to the rule we establish today for disorders in the courtroom. We are convinced, however, that no such special rule is needed. It is old law that the guarantees of jury trial

> found in Article III and the Sixth Amendment *do not apply to petty offenses* (391 U. S. at 209-210).

lends itself to the reasonable deduction affirming the power of the court to punish for direct criminal contempt and to impose punishment summarily.

Illinois v. Allen, 397 U. S. 337 (1970) clearly affirms this:

> We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly.

However, the Commonwealth concedes that the import of those cases in this regard is the power to punish for short sentences and do not necessarily contemplate punishment of the nature meted out here.

The recent decision of your Honorable Court in *Baldwin v. New York*, ___ U. S. ___ (decided June 22, 1970) does not mandate a different result here. In speaking of the right to a jury trial, Mr. Justice White stated:

> . . . In deciding whether an offense is "petty," we have sought objective criteria reflecting the seriousness with which society regards the offense, *District of Columbia v. Clawans*, 300 U. S. 617, 628 (1937), and we have found the most relevant such criteria in the severity of the maximum authorized penalty. *Frank v. United States*, 395 U. S. 147, 148 (1969); *Duncan v. Louisiana, supra*, at 159-161; *District of Columbia v. Clawans, supra*, at 628. Applying these guidelines, we have held that a possible six-month penalty is short enough to permit classification of the offense as "petty", *Dyke v. Taylor Implement Co.*, 391 U. S. 216, 220 (1968); *Cheff v. Schnackenberg*, 384 U. S. 373 (1966), but that a two-year maximum is sufficiently "serious" to require an opportunity for jury trial, *Duncan v. Louisiana, supra*. The question in this case is whether

> the possibility of a one-year sentence is enough in itself to require the opportunity for a jury trial. We hold that it is. More specifically, we have concluded that no offense can be deemed "petty" for purposes of the right to trial by jury where imprisonment for more than six months is authorized.

Consequently, since the sentence here exceeded a one year duration for each contempt, the petitioner would have been entitled to a jury trial since the direct criminal contempt here cannot be considered a "petty" offense. Nonetheless, citing the language of *DeStefano v. Wood*, 392 U. S. at 634, the Commonwealth respectfully urges that *Baldwin* be held to prospective application only:

> The values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial. Second, states undoubtedly relied in good faith upon the past opinions of this court to the effect that the Sixth Amendment right to jury trial was not applicable to the States. . . .Third, the effect of holding of general retroactivity of law enforcement and the administration of justice would be significant, because the denial of jury trial has occurred in a very great number of cases in those States not until now accepting the Sixth Amendment guarantee.

Were *Bloom* and *Baldwin* retroactive, the Commonwealth would concede that petitioner was entitled to a jury trial.

The Commonwealth does not concede, however, that petitioner is entitled to a reversal on the grounds that *Bloom* retroactively holds that a contemnor is entitled to a non-jury trial proceeding.

Prior to your Honorable Court's pronouncements in *Bloom* and *Baldwin*, the law of direct criminal contempt

of Pennsylvania met existing due process requirements. The Pennsylvania courts adopted the pronouncement of *In Re Oliver*, 333 U. S. 257 (1948).

In *Weiss v. Jacobs*, 405 Pa. 390, 394-395, 175 A. 2d 849 (1961), the Pa. Supreme Court said:

> In *In Re Oliver*, 333 U. S. 257, at 275-276, the United States Supreme Court stated: "due process of law, . . . requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf either by way of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open Court, in the presence of the Judge, which disturbs the Court's business, where all of the essential elements of the misconduct are under the eye of the Court . . . and where immediate punishment is essential to prevent 'demoralization of the Court's authority' before the public. If some essential elements of the offense are not personally observed by the Judge, . . . due process requires, . . . that the accused be accorded notice and a fair hearing . . ."

Consequently, petitioner's rights to procedural due process were clearly protected since the trial court complied with the then-existing state of Pennsylvania law.

The loss of the other rights allegedly denied the petitioner would have been prejudicial only in the context of a jury trial.

17 P. S. 2047 (b) makes it clear that an alleged contemnor is not entitled "to be notified of the accusation and a reasonable time to make a defense" if the alleged contempt occurred in open court. As has previously been demonstrated, the recent decisions of your Honorable Court granting those charged with "serious" contempts

the right to a jury trial are inapplicable to the instant case. 17 P. S. 2047(c) does not give one who has committed contempt in the presence of the court—as the petitioner most certainly did—the right to a jury trial. In any event, petitioner never requested a jury trial, as the statute undoubtedly requires. Nor did the provisions of 17 P. S. 2047(d) prevent the trial judge from himself imposing the sentences. In short, under the law of this Commonwealth, a person committing direct criminal contempt may be summarily convicted so long as the provisions of the statute are met. This was done here. None of petitioner's rights were infringed.[4]

No authority for petitioner's contention that he should have had notice is to be found in Pennsylvania cases or statutes. It is noted that not even the statute governing the procedure to be followed in *indirect* criminal cases, Act of June 23, 1931, P. L. 925, § 1, 17 P. S. 2047, requires that the trial judge advise a defendant of the nature and elements of the crime of criminal contempt. Nor does it seem that the giving of such a warning is required by due process.

Moreover, it is reasonable for your Honorable Court to infer that petitioner's common sense and previous experience with criminal contempt would give him some idea that the trial court might regard his actions as contemptuous. The Commonwealth believes it relevant to note that the appellant was convicted of direct criminal contempt

[4] The Commonwealth wishes to note that the trial judge, exercising almost inhuman patience and restraint, did not convict petitioner of contempt immediately following each of the contemptuous acts. Undoubtedly, this was because the trial judge did not want any action he might take during the course of the trial to prejudice the petitioner's rights to a fair trial and therefore delayed convicting the petitioner of contempt until after the jury had returned its verdict. It is ironic that the trial judge's attempt to protect the petitioner's rights has only prompted a complaint that petitioner's rights were violated.

of court in a trial in May of 1966 in Philadelphia. The Pennsylvania Supreme Court specifically found that Mayberry knew that his actions were contumacious.

> . . .The language and actions of Mayberry, even though he is a layman, were of such a nature that he had every reason to know that his conduct was in contempt of court; moreover, it is evident from this record that Mayberry's conduct was part of a scheme and plan to disrupt and render chaotic the conduct of his trial. We see no reason, under the circumstances, why Mayberry on each and every occasion should have been warned of that of which he must have been fully aware. He knew that his conduct was outrageous and he deliberately planned such a course of conduct (434 Pa. at 486).

In any event, on at least two occasions, the trial judge indicated that he regarded the petitioner's speech and action as contemptuous.

> The Court: Is there anything else you want to put on the record?
>
> Mr. Mayberry: That any personal feelings you may display towards the defendants have nothing to do with the facts of the case or the guilt or innocence of the defendants.
>
> The Court: That is Correct, Mr. Mayberry, and at the proper time I will state to the jury—at this time I will state to the jury I have no feelings about this case. I do have feelings that the contempt that the defendants have shown in this case towards the Court, but at the proper time I will instruct the jury to disregard that and to try this case solely and simply upon the evidence that has been presented in this case.
>
> Mr. Mayberry: Now, your Honor, am I to understand that you are holding the defendants in contempt?
>
> The Court: I didn't say that.
>
> Mr. Mayberry: Do I understand you to say that the defendant Mayberry has exhibited contempt for the process of law and justice in this Court?
>
> The Court: We will take care of that matter at a later stage. Proceed with your cross examination.

* * *

(Thereupon Mr. Langnes was escorted back into the courtroom.)

Mr. Langnes: I still refuse to shut up.

Mr. Mayberry: Now, what I was saying—

The Court: You keep quiet, Mr. Langnes. Proceed with your questioning.

Mr. Langnes: What I was saying—

The Court: Keep quiet.

Mr. Langnes: —about the newspapers and—

The Court: Keep quiet. We will hear you at a later time, at the lunch hour.

Mr. Langnes: I am saying it now while the people are here and know what's coming off.

The Court: Do we have a gag here?

Mr. Langnes: You'll have to gag me.

The Court: Do we have a gag here?

(Off record discussion.)

Mr. Mayberry: I have to ask for a severance.

The Court: I have heard that before. It is denied again. Let's go on.

(Exception noted.)

Mr. Mayberry: This is the craziest trial I have ever seen.

Mr. Mayberry: Well, my next witness is George Deputy, who I call next.

The Court: Refused.

Mr. Mayberry: And after that I ask for Edward C. Robinson, a prisoner at the penitentiary be called as a witness.

The Court: Mr. Mayberry, of all the innumerable contempts you have committed, you are committing a contempt of court. I have told you that you have certain witnesses that have been subpoenaed that may be called.

Mr. Mayberry: All I am asking the Court is to rule.

The Court: There will be no more name calling.

Mr. Mayberry: Is it the same ruling?

The Court: No, sir. I am not going to keep ruling on that. I want you to understand that, Mr. Mayberry. Now call the witnesses whom the Court indicated that are available to you.

Mr. Mayberry: Before I get to that I wish to have a ruling, and I don't care if it is contempt or whatever you want to call it, but I want a ruling for the record

that I am being denied these witnesses that I asked for months before this trial ever began.

The Court: Once again let the record show that the defendant Mayberry together with all of the other defendants have submitted a list of witnesses with a show of proof. The Court has passed upon all of those witnesses and the reason stated in the show of proof as a result of which certain witnesses were subpoenaed to appear in this Court. The Court therefore is limiting the defendants to the production of those witnesses who have been subpoenaed to appear in this case.

The Court: You will not be permitted to ask this witness any questions relating to your cell block and the job that you had. You will not be permitted to ask this witness relating to the selling job that you had to prove you had nothing to do with this escape.

These are matters that you will not be permitted to make inquiries into.

Mr. Mayberry: Yeah? Why? What are you scared that certain fact might be brought out?

The Court: I have made a ruling, Mr. Mayberry, limiting—

Mr. Mayberry: I know what the hell you done, you creep. What do you do? Eat at the same club as him every night? Scared that certain facts might be brought out?

The Court: These are the limits in which you will not interrogate this witness, and I will tell you ahead now that we will stop you, if you do (TT 2503-2611).

It is submitted that these statements of the trial judge sufficed to appraise the Petitioner that his speech and actions were regarded as contemptuous.

B. Petitioner was not entitled to speak in mitigation of sentence by himself or through specially-appointed counsel.

Petitioner urges that despite the repeated and heavy abuse to which he subjected the trial court, the trial court should have permitted him to speak in mitigation of the sentence to be pronounced.

The Commonwealth contends that petitioner waived any right to speak in mitigation of sentence, either by himself or through counsel.

In a summary conviction the defendant necessarily looses certain customary procedural safeguards, among them the right to representation by counsel. *Cf., Sacher v. United States,* 343 U. S. 1, 72 S. Ct. 451 (1952). *In Re Oliver, supra.* In *Holt v. Commonwealth of Virginia,* 381 U. S. 131, 85 S. Ct. 1375 (1965) the Supreme Court indicated that the defendant in the type of contempt there under review did not lose his Sixth Amendment right to counsel. 381 U. S. at 136, 85 S. Ct. at 1378. In support of this statement the court cited *In Re Oliver, supra,* and *Gideon v. Wainwright,* 372 U. S. 335, 83 S. Ct. 792 (1963). However, it is to be noted that the type of contempt under review in *Holt* is far different from that presently before your Honorable Court. The court noted in *Holt:* "It is not charged that petitioners here disobeyed any valid court order, talked loudly, acted boisterously, or attempted to prevent the judge or any officer of the court from carrying on his court duties." 381 U. S. or 136, 85 S. Ct. at 1377-1378.

The Commonwealth respectfully submits that one whose actions are so contemptuous as to necessitate the court to wield its summary powers to protect itself does not have the right to the assistance of counsel. The loss of right to the assistance of counsel is a necessary, although harsh, corollary of a court's exercise of its summary powers. Therefore, those contempts which may be summarily punished are narrowly defined and generally due process requires that the normal procedural safeguards are not lost to one charged with contempt. See 17 P. S. 2047; *In Re Oliver, supra.* Petitioner's conduct, falling within that

category of contempts which may be summarily punished, leads to the loss of the right to the assistance of counsel.

Moreover, petitioner consistently and repeatedly stated that he wanted to represent himself and would not accept court-appointed counsel. Nonethless, an Assistant Public Defender appeared with him at all times.

In addition, petitioner lost any right to speak on his own behalf by the very nature of the constant verbal abuse directed to the court.[5] He was not entitled to speak in mitigation since the contempt was committed in the presence of the sentencing judge. Petitioner is unable to cite any specific matter which he could or would have brought to the court's attention at sentencing and the Commonwealth maintains that nothing could possibly have justified, excused or mitigated the constant barrage of abuse in which petitioner engaged.

At sentencing petitioner did not give the slightest indicia of remorse. If petitioner wished to express some reason for his actions, he could certainly have petitioned the court to modify the sentence. Petitioner did not do so but chose to exercise his right of direct appeal to the Pennsylvania Supreme Court.

Since the lower court sentenced petitioner in accordance with a law in effect before *Bloom,* petitioner's only due process challenge must be whether the sentencing court followed the procedure of the statute.

The Pennsylvania Supreme Court held that the sentencing court had fully protected the rights to which the petitioner was entitled.

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[5] It is interesting to note that petitioner was convicted of direct criminal contempt of court in a trial in May of 1966 in Philadelphia. See Nos. 395, 396, 397, 398, 399 January Term, 1966. At the sentencing on this contempt, petitioner utilized his right to speak in mitigation to heap additional abuse upon the sentencing court.

II. Due process does not require the trial judge to disqualify himself where the contempt was committed in his presence nor do the peculiar facts herein warrant such action.

Petitioner apparently maintains that the sentencing court should have surrendered its plenary power to sentence summarily for direct criminal contempt *sua sponte*.

It should be noted that petitioner did not request the disqualification but chooses now to raise this on appeal. It is no answer to say that petitioner was denied the right to challenge the jurisdiction of the court of grounds of alleged bias since petitioner did have previous experience with contempt charges and could have prepared and filed a *written* petition. In addition, he could have requested his court-appointed trial counsel to do so in his behalf.

The Commonwealth does not challenge the line of cases beginning with *Cooke v. United States*, 267 U. S. 517 (1925) insofar as they call for the disqualification of a trial judge who has been subjected to severe personal criticism.

However, these cases are not applicable to the present case for several reasons.

Initially, it must be remembered that the petitioner was sentenced under the court's inherent power to punish for contempts committed within its presence. This power is neither abolished nor diminished by *Illinois v. Allen*, *supra*. In fact, *Allen* reinforces the use of the criminal contempt power as a legitimate and constitutional method of controlling an unruly defendant.

Secondly, the same considerations that led the *Sacher* court to withhold sentencing until the conclusion of the trial are applicable here. Petitioner was acting as his own

counsel and the court obviously waited until the conclusion of the trial in order to prevent the contempt punishment from interfering with petitioner's representation or to have any effect upon the jury's impartial resolution of the felony charges. Certainly the judge could have done at the conclusion of the trial what he could have done during the course of trial but waited to protect petitioner.

Finally, the thrust of the verbal abuse by the petitioner was directed toward preventing the trial. Consequently, as is pointed out in Section III below, it is irrelevant that many of the epithets petitioner utilized were of a personal nature. It is beyond question that the trial judge realized this and continued with the trial.

Therefore, since the sentencing judge was under no constitutional or statutory duty to disqualify himself and petitioner never requested him to do so, this challenge should be denied.

III. The Pennsylvania Criminal Contempt Statute, as applied to petitioner, is not unconstitutionally vague.

Petitioner contends that the Act of June 16, 1836, P. L. 784 § 23, 17 P. S. § 2041 is unconstitutional as applied to the instant case because it fails to establish a standard of permissible behavior and its terms are unclear and indefinite. The Commonwealth, of course, agrees that this statute is applicable to the instant case. However, the Commonwealth disagrees with the conclusions petitioner reaches concerning the statute.

The Commonwealth respectfully submits that the behavior prohibited by the statute is clear enough so that anyone appearing in court would know which acts or words are permissible and which not.

Petitioner's argument here is that nine of the eleven counts of contempt consisted solely of personal epithets directed at the trial judge. Consequently, he alleges that these nine "verbal epithets and allegations of misconduct" cannot be fairly described as obstructing the administration of justice.

The Commonwealth maintains that not only is this allegation a misstatement of fact but is a ludicrous distortion of the chaotic atmosphere which petitioner created.

As the Pennsylvania Supreme Court so correctly stated:

> The instant case presents an example of a person charged with a criminal offense who deliberately, consciously and intentionally enters upon his trial proposing to so obstruct, by his language and his actions, the orderly trial process in order to thwart the administration of justice. Such conduct cannot and should not be tolerated. To hold otherwise is to make a mockery of criminal trials and to render our courts subject to infamy and abuse (434 Pa. at 486).

To describe the innumerable delays, courtroom disturbances and general disorder which petitioner caused would require substantial space. Unfortunately, the record does not specifically reflect the length time lapses which occurred nor the disruptions reflected in the courtroom. Nonetheless, these did occur and petitioner cannot take advantage of a cold record to deny this. There can be no doubt that petitioner's "misbehavior" had the effect of "obstructing the administration of justice." Were it not for the tremendous patience and continued perseverance of the trial judge, surely petitioner would have achieved his goal of preventing the trial.

IV. Petitioner's sentence of one-to-two years for each contempt does not constitute cruel and unusual punishment.

Petitioner's contention that he has been subjected to "cruel and unusual punishment" in violation of the Eighth Amendment because of the length of the sentences imposed is without merit.

The Commonwealth wishes to point out that petitioner erroneously lumps together the eleven one-to-two year sentences imposed and treats them as a single sentence. The lower court meticulously segregated the various contemptuous acts and imposed separate sentences for each. The eleven separate sentences may not be treated as a single sentence.

The Commonwealth earnestly contends that although petitioner may have displayed a "continuous contemptuous attitude" toward the court, his speech and actions may be separated into distinct contempuous acts. Petitioner's words and actions were not so close in time or manner that they merged into a single act of contempt. Petitioner committed eleven separate acts of direct criminal contempt. Even if these sentences are consolidated, twenty-two years is the maximum sentence. As previously note, imprisonment is the proper punishment for direct criminal contempt and each contempt may be separately punished. Your Honorable Court upheld a contempt sentence of three years for one count in *Green v. United States,* 365 U. S. 165 (1958).

There is no doubt as to the applicability of the Eighth Amendment to the states. However, considering that imprisonment has been the historic punishment for direct criminal contempts, the Commonwealth respectfully submits that it is neither cruel nor unusual punishment.

Conclusion

The Commonwealth's position is that the petitioner's actions and words were contemptuous and that he was properly summarily convicted of direct criminal contempt of court. The procedural rights with which petitioner now seeks to surround himself do not attach to a summary conviction. The warnings he contends should have been given by the trial judge are not required by Pennsylvania law or by the Due Process Clause of the Fourteenth Amendment. The sentences imposed were proper.

The Pennsylvania statute defining what contemptuous actions may be summarily punished does provide a clear standard of prohibited behavior and is not unconstitutionally vague.

The order of the lower court must be affirmed.

Respectfully submitted,

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MAYBERRY *v.* PENNSYLVANIA

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

No. 121. Argued December 17, 1970—Decided January 20, 1971

Under the facts of this case, a defendant in a state criminal contempt proceeding who vilified the judge during the course of the defendant's trial in the state court and was sentenced by that judge to 11 to 22 years for the contempt was entitled under the Due Process Clause of the Fourteenth Amendment to a public trial before another judge. Pp. 8–12.

434 Pa. 478, 255 A. 2d 131, vacated and remanded.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. BURGER, C. J., and HARLAN, J., filed concurring opinions. BLACK, J., filed a separate statement.

SUPREME COURT OF THE UNITED STATES

No. 121.—October Term, 1970

Richard Mayberry, Petitioner, *v.* State of Pennsylvania. | On Writ of Certiorari to the Supreme Court of Pennsylvania, Western District.

[January 20, 1971]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner and two codefendants were tried in a state court for prison breach and holding hostages in a penal institution. While they had appointed counsel as advisers, they represented themselves. The trial ended with a jury verdict of guilty of both charges on the 21st day, which was a Friday. The defendants were brought in for sentencing on the following Monday. Before imposing sentence on the verdicts the judge pronounced them guilty of criminal contempt. He found that petitioner had committed one or more contempts on 11 of the 21 days of trial and sentenced him to not less than one nor more than two years for each of the 11 contempts or a total of 11 to 22 years.

The Supreme Court of Pennsylvania affirmed by a divided vote. 434 Pa. 478, 255 A. 2d 131. The case is here on a petition for writ of certiorari. 397 U. S. 1020.

Petitioner's conduct at the trial comes as a shock to those raised in the western tradition that considers a courtroom a hallowed place of quiet dignity as far removed as possible from the emotions of the street.

(1) On the first day of the trial petitioner came to the side bar to make suggestions and obtain rulings on trial

procedures. Petitioner said: "It seems like the court has the intentions of railroading us" and moved to disqualify the judge. The motion was denied. Petitioner's other motions, including his request that the deputy sheriffs in the courtroom be dressed as civilians, were also denied. Then came the following colloquy:

> "Mr. Mayberry: I would like to have a fair trial of this case and like to be granted a fair trial under the Sixth Amendment.
>
> "The Court: You will get a fair trial.
>
> "Mr. Mayberry: It doesn't appear that I am going to get one the way you are overruling all our motions and that, and being like a hatchet man for the State.
>
> "The Court: This side bar is over.
>
> "Mr. Mayberry: Wait a minute, Your Honor.
>
> "The Court: It is over.
>
> "Mr. Mayberry: You dirty sonofabitch."

(2) The second episode took place on the eighth day of the trial. A codefendant was cross-examining a prison guard and the court sustained objections to certain questions:

> "Mr. Codispoti: Are you trying to protect the prison authorities, Your Honor? Is that your reason?
>
> "The Court: You are out of order, Mr. Codispoti. I don't want any outbursts like that again. This is a court of justice. You don't know how to ask questions.
>
> "Mr. Mayberry: Possibly Your Honor doesn't know how to rule on them.
>
> "The Court: You keep quiet.
>
> "Mr. Mayberry: You ought to be Gilbert and Sullivan the way you sustain the district attorney every time he objects to the questions.

"The Court: Are you through? When your time comes you can ask questions and not make speeches."

(3) The next charge stemmed from the examination of an inmate about a riot in prison in which petitioner apparently was implicated. There were many questions asked and many objections sustained. At one point the following outburst occurred:

"Mr. Mayberry: Now, I'm going to produce my defense in this case and not be railroaded into any life sentence by any dirty, tyrannical old dog like yourself.

"The Court: You may proceed with your questioning, Mr. Mayberry."

(4) The fourth charge grew out of an examination of another defense witness:

"By Mr. Mayberry:

"Q. I ask you, Mr. Nardi, is that area, the handball court, is it open to any prisoner who wants to play handball, who cares to go to that area to play handball?

"A. Yes.

"Q. Did you understand the prior question when I asked you if it was freely open and accessible area?

"The Court: He answered your question. Let's go on.

"Mr. Mayberry: I am asking him now if he understands——

"The Court: He answered it. Now, let's go on.

"Mr. Mayberry: I ask Your Honor to keep your mouth shut while I'm questioning my own witness. Will you do that for me?

"The Court: I wish you would do the same. Proceed with your questioning."

(5) The fifth charge relates to a protest which the defendants made that at the end of each trial day they

were denied access to their legal documents—a condition which the trial judge shortly remedied. The following ensued:

"Mr. Mayberry: You're a judge first. What are you working for? The prison authorities, you bum?

"Mr. Livingston: I have a motion pending before your honor.

"The Court: I would suggest——

"Mr. Mayberry: Go to hell. I don't give a good God damn what you suggest, you stumbling dog."

Meanwhile one defendant told the judge if he did not get access to his papers at night he'd "blow your head off." Another defendant said he would not sit still and be "kowtowed and railroaded into a life imprisonment." Then the following transpired:

"Mr. Mayberry: You started all this bullshit in the beginning.

"The Court: You keep quiet.

"Mr. Mayberry: Wait a minute.

"The Court: You keep quiet.

"Mr. Mayberry: I am my own counsel.

"The Court: You keep quiet.

"Mr. Mayberry. Are you going to gag me?

"The Court: Take these prisoners out of here. We will take a ten minute recess, members of the jury."

(6) The sixth episode happened when two of the defendants wanted to have some time to talk to a witness whom they had called. The two of them had had a heated exchange with the judge when the following happened:

"Mr. Mayberry: Just one moment, Your Honor.

"The Court: This is not your witness, Mr. Mayberry. Keep quiet.

"Mr. Mayberry: Oh, yes, he is my witness, too. He is my witness, also. Now, we are at the peni-

tentiary and in seclusion. We can't talk to any of our witnesses prior to putting them on the stand like the District Attorney obviously has the opportunity, and as he obviously made use of the opportunity to talk to his witnesses. Now——

"The Court: Now, I have ruled, Mr. Mayberry.

"Mr. Mayberry: I don't care what you ruled. That is unimportant. The fact is——

"The Court: You will remain quiet, sir, and finish the examination of this witness.

"Mr. Mayberry: No, I won't be quiet while you try to deny me the right to a fair trial. The only way I will be quiet is if you have me gagged. Now, if you want to do that, that is up to you; but in the meantime I am going to say what I have to say. Now, we have the right to speak to our witnesses prior to putting them on the stand. This is an accepted fact of law. It is nothing new or unusual. Now, you are going to try to force us to have our witness testify to facts that he has only a hazy recollection of that happened back in 1965. Now, I believe we have the right to confer with our witness prior to putting him on the stand.

"The Court: Are you finished?

"Mr. Mayberry: I am finished.

"The Court: Proceed with your examination."

(7) The seventh charge grew out of an examination of a codefendant by petitioner. The following outburst took place:

"By Mr. Mayberry:

"Q. No. Don't state a conclusion because Gilbert is going to object and Sullivan will sustain. Give me facts. What leads you to say that?"

Later petitioner said:

"Mr. Mayberry: My witness isn't being in an

inquisition, you know. This isn't the Spanish Inquisition."

Following other exchanges with the court, petitioner said:

"Mr. Mayberry: Now, just what do you call proper? I have asked questions, numerous questions and everyone you said is improper. I have asked questions that my adviser has given me, and I have repeated these questions verbatim as they came out of my adviser's mouth, and you said they are improper. Now just what do you consider proper?

"The Court: I am not here to educate you, Mr. Mayberry.

"Mr. Mayberry: No. I know you are not. But you're not here to railroad me into no life bit, either.

"Mr. Codispoti: To protect the record——

"The Court: Do you have any other questions to ask this witness?

"Mr. Mayberry: You need to have some kind of psychiatric treatment, I think. You're some kind of a nut. I know you're trying to do a good job for that Warden Maroney back there, but let's keep it looking decent anyway, you know. Don't make it so obvious, Your Honor."

(8) A codefendant was removed from the courtroom and when he returned petitioner asked for a severance.

"Mr. Mayberry: I have to ask for a severance.

"The Court: I have heard that before. It is denied again. Let's go on."

(Exception noted.)

"Mr. Mayberry: This is the craziest trial I have ever seen.

"The Court: You may call your next witness, Mr. Mayberry."

Petitioner wanted to call witnesses from the penitentiary whose names had not been submitted earlier and for whom no subpoenas were issued. The court restricted the witnesses to the list of those subpoened:

> "Mr. Mayberry: Before I get to that I wish to have a ruling, and I don't care if it is contempt or whatever you want to call it, but I want a ruling for the record that I am being denied these witnesses that I asked for months before this trial ever began."

(9) The ninth charge arose out of a ruling by the court on a question concerning the availability of tools to prisoners in their cells.

> "The Court: I have ruled on that, Mr. Mayberry. Now proceed with with your questioning, and don't argue.
>
> "Mr. Mayberry: You're arguing. I'm not arguing, not arguing with fools."

(10) The court near the end of the trial had petitioner ejected from the courtroom several times. The contempt charge was phrased as follows by the court:

> "On December 7, 1966, you have created a despicable scene in refusing to continue calling your witnesses and in creating such consternation and uproar as to cause a termination of the trial."

(11) As the court prepared to charge the jury, petitioner said:

> "Before Your Honor begins the charge to the jury defendant Mayberry wishes to place his objection on the record to the charge and to the whole proceedings from now on, and he wishes to make it known to the Court now that he has no intention of remaining silent while the Court charges the jury, and that he is going to continually object to the charge of the Court to the jury throughout the entire charge, and he is not going to remain silent. He is going

> to disrupt the proceedings verbally throughout the entire charge of the Court, and also he is going to be objecting to being forced to terminate his defense before he was finished."

The court thereupon had petitioner removed from the courtroom and later returned gagged. But petitioner caused such a commotion under gag that the court had him removed to an adjacent room where a loud speaker system made the courtroom proceedings audible. The court phrased this contempt charge as follows:

> "On December 9, 1966, you have constantly, boisterously, and insolently interrupted the Court during its attempts to charge the jury, thereby creating an atmosphere of utter confusion and chaos."

These brazen efforts to denounce, insult, and slander the court and to paralyze the trial are at war with the concept of justice under law. Laymen, foolishly trying to defend themselves, may understandably create awkward and embarrassing scenes. Yet that is not the character of the record revealed here. We have here downright insults of a trial judge, and tactics taken from street brawls and transported to the courtroom. This is conduct not "befitting an American courtroom," as we said in *Illinois* v. *Allen*,* 397 U. S. 337, 346; and criminal contempt is one appropriate remedy. *Id.*, at 344–345.

As these separate acts or outbursts took place, the arsenal of authority described in *Allen* was available to the trial judge to keep order in the courtroom. He could, with propriety, have instantly acted, holding petitioner in contempt, or excluding him from the courtroom, or otherwise insulating his vulgarity from the courtroom. The Court noted in *Sacher* v. *United States*, 343

*Petitioner was sentenced for contempt December 12, 1966. The Pennsylvania Supreme Court affirmed on April 23, 1969. We decided *Illinois* v. *Allen* on March 31, 1970.

U. S. 1, 10, that, while instant action may be taken against a lawyer who is guilty of contempt, to pronounce him guilty of contempt is "not unlikely to prejudice his client." Those considerations are not pertinent here where petitioner undertook to represent himself. In *Sacher* the trial judge waited until the end of the trial to impose punishment for contempt, the Court saying:

> "If we were to hold that summary punishment can be imposed only instantly upon the event, it would be an incentive to pronounce, while smarting under the irritation of the contemptuous act, what should be a well-considered judgment. We think it less likely that unfair condemnation of counsel will occur if the more deliberate course be permitted." *Id.*, at 11.

Generalizations are difficult. Instant treatment of contempt where lawyers are involved may greatly prejudice their clients but it may be the only wise course where others are involved. Moreover, we do not say that the more vicious the attack on the judge the less qualified he is to act. A judge cannot be driven out of a case. Where, however, he does not act the instant the contempt is committed, but waits until the end of the trial, on balance, it is generally wise where the marks of the unseemly conduct have left personal stings to ask a fellow judge to take his place. What Chief Justice Taft said in *Cooke* v. *United States,* 267 U. S. 517, 539, is relevant here:

> "The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court is most important and indispensable. But its exercise is a delicate one and care is needed to avoid arbitrary or oppressive conclusions. This rule of caution is more man-

> datory where the contempt charged has in it the element of personal criticism or attack upon the judge. The judge must banish the slightest personal impulse to reprisal, but he should not bend backward and injure the authority of the court by too great leniency. The substitution of another judge would avoid either tendency but it is not always possible. Of course where acts of contempt are palpably aggravated by a personal attack upon the judge in order to drive the judge out of the case for ulterior reasons, the scheme should not be permitted to succeed. But attempts of this kind are rare. All of such cases, however, present difficult questions for the judge. All we can say upon the whole matter is that where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place."

We conclude that that course should have been followed here, as marked personal feelings were present on both sides.

Whether the trial be federal or state, the concern of due process is with the fair administration of justice. At times a judge has not been the image of "the impersonal authority of law" (*Offutt* v. *United States*, 348 U. S. 11, 17) but has become so "personally embroiled" with a lawyer in the trial as to make the judge unfit to sit in judgment on the contempt charge.

"The vital point is that in sitting in judgment on such a misbehaving lawyer the judge should not himself give vent to personal spleen or respond to a personal grievance. These are subtle matters, for they concern the ingredients of what constitutes justice. Therefore, justice must satisfy the appearance of justice." *Id.*, at 14.

Offutt does not fit this case for the state judge in the instant controversy was not an activist seeking combat. Rather, he was the target of petitioner's insolence. Yet a judge, villified as was this Pennsylvania judge, necessarily becomes embroiled in a running, bitter controversy. No one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication. *In re Murchison*, 349 U. S. 133, was a case where a judge acted under state law as a one-man grand jury and later tried witnesses for contempt who refused to answer questions propounded by the "judge grand jury." We held that since the judge who sat as a one-man grand jury was part of the accusatory process he "cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused." *Id.*, at 137. "Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." *Ibid.*

It is of course not every attack on a judge that disqualifies him from sitting. In *Ungar* v. *Sarafite*, 376 U. S. 575, we ruled that a lawyer's challenge, though "disruptive, recalcitrant, and disagreeable commentary," was still not "an insulting attack upon the integrity of the judge carrying such potential for bias as to require disqualification." *Id.*, at 584. Many of the words levelled at the judge in the instant case were highly personal aspersions, even "fighting words"—"dirty sonofabitch," "dirty tyrannical old dog," "stumbling dog," and "fool." He was charged with running a Spanish Inquisition and told to "Go to hell" and "Keep your mouth shut." Insults of that kind are apt to strike "at the most vulnerable and human qualities of a judge's temperament." *Bloom* v. *Illinois*, 391 U. S. 194, 202.

Our conclusion is that by reason of the Due Process Clause of the Fourteenth Amendment a defendant in criminal contempt proceedings should be given a public

trial before a judge other than the one reviled by the contemnor. See *In re Oliver*, 333 U. S. 257. In the present case that requirement can be satisfied only if the judgment of contempt is vacated so that on remand another judge, not bearing the sting of these slanderous remarks and having the impersonal authority of the law, sits in judgment on the conduct of petitioner as shown by the record.

Vacated and remanded.

MR. JUSTICE BLACK concurs in the judgment and with all the opinion except that part which indicates that the judge without a jury could have convicted Mayberry of contempt instantaneously with the outburst.

SUPREME COURT OF THE UNITED STATES

No. 121.—October Term, 1970

Richard Mayberry, Petitioner, *v.* State of Pennsylvania. | On Writ of Certiorari to the Supreme Court of Pennsylvania, Western District.

[January 20, 1971]

Mr. Chief Justice Burger, concurring.

I concur in the Court's opinion and add these additional observations chiefly for emphasis. Certain aspects of the problem of maintaining in courtrooms the indispensable atmosphere of quiet orderliness are crucial. Without order and quiet, the adversary process must fail. Three factors should be noted: (1) as Mr. Justice Douglas has said, the trial was conducted without the guidance afforded by Mr. Justice Black's opinion for the Court in *Illinois* v. *Allen;* (2) although the accused was afforded counsel at his trial he asserted a right to act as his own counsel and the court permitted him to do so; (3) we are not informed whether Pennsylvania has a statute covering obstruction of justice that would reach the conduct of the accused shown by this record.

(1)

As the Court's opinion suggests, the standards of *Illinois* v. *Allen, supra,* would have enabled the trial judge to remove the accused from the courtroom after his first outrageous actions and words, and to summarily punish him for contempt. The contempt power, however, is of limited utility in dealing with an incorrigible, a cunning psychopath, or an accused bent on frustrating the particular trial or undermining the processes of justice. For such as these, summary removal from the courtroom is

the really effective remedy. Indeed it is one, as this case shows, where removal could well be a benefit to the accused in the sense that one episode of contemptuous conduct would be less likely to turn a jury against him than 11 episodes. As noted by MR. JUSTICE BLACK in *Illinois* v. *Allen* and MR. JUSTICE DOUGLAS here, a fixed rule to fit every situation is not feasible; plainly summary removal is the most salutary remedy in cases such as this.

(2)

Here the accused was acting as his own counsel but had a court appointed lawyer as well. This suggests the wisdom of the trial judge in having counsel remain in the case even in the limited role of a consultant. When a defendant refuses counsel, as he did here, or seeks to discharge him, a trial judge is well advised—as so many do—to have such "standby counsel" to perform all the services a trained advocate would perform ordinarily by examination and cross-examination of witnesses, objecting to evidence and making closing argument. No circumstance that comes to mind allows an accused to interfere with the absolute right of a trial judge to have such "standby counsel" to protect the rights of accused persons "foolishly trying to defend themselves," as MR. JUSTICE DOUGLAS so aptly described it. In every trial there is more at stake than just the interests of the accused; the integrity of the process warrants a trial judge exercising his discretion to have counsel participate in the defense even when rejected. A criminal trial is not a private matter; the public interest is so great that the presence and participation of counsel, even when opposed by the accused, is warranted in order to vindicate the process itself. The value of the precaution of having independent counsel, even if unwanted, is underscored by situations where the accused is removed from the

courtroom under *Illinois* v. *Allen*. The presence of counsel familiar with the case would at the very least blunt Sixth Amendment claims, assuming they would have merit, when the accused has refused legal assistance and then brought about his own removal from the proceedings.

(3)

There are other means to cope with grave misconduct in the courtroom, whether that of the accused, his counsel, spectators or others. Statutes defining obstruction of justice have long been in force in many States, with penalties measured in years of confinement. Such statutes, where available, are an obvious response to those who seek to frustrate a particular trial or undermine the processes of justice generally.

A review of this record warrants a closing comment on the exemplary patience of the trial judge under provocation few human beings could accept with equanimity. Our holding that contempt cases with penalties of the magnitude imposed here should be heard by another judge does not reflect on his performance; it relates rather to a question of procedure.

SUPREME COURT OF THE UNITED STATES

No. 121.—October Term, 1970

Richard Mayberry, Petitioner, *v.* State of Pennsylvania.	On Writ of Certiorari to the Supreme Court of Pennsylvania, Western District.

[January 20, 1971]

Mr. Justice Harlan, concurring.

I concur in the judgment of reversal solely on the ground that these contempt convictions must be regarded as infected by the fact that the unprecedented long sentence of 22 years which they carried was imposed by a judge who himself had been the victim of petitioner's shockingly abusive conduct. That circumstance seems to me to deprive the contempt proceeding of the appearance of evenhanded justice which is at the core of due process. For this reason I think the contempt convictions must be set aside, leaving the State free to try the contempt specifications before another judge or to proceed otherwise against this petitioner.

It is unfortunate that this Court's decision in *Allen* v. *Illinois*, 397 U. S. 337 (1970), was not on the books at the time the criminal case against this petitioner was on trial. The courses which that decision lays open to trial judges for coping with outrageous courtroom tactics of the sort engaged in by this petitioner would doubtless have enabled Judge Fiok to deal with the petitioner in a manner that would have obviated the regrettable necessity for setting aside this contempt conviction.